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Supreme Court, U.S.
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No. 02-1105 JAN 16 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES,

Petitioners,

v.

JOSEPHTHAL GROUP, INC., a corporation; JOSEPHTHTAL HOLDINGS, INC., a corporation; JOSEPHTHAL LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Did the Court of Appeals depart from the accepted and usual course of judicial proceedings so far as to call for an exercise of this Court's supervisory power, when an order dismissing an appeal was prepared, signed, and entered by someone other than the clerk of the court, in violation of Federal Rule of Appellate Procedure 36, and when the order is in apparent conflict with the initial docket entry reflecting the instructions of the Court?

II

Does the order dismissing the appeal (on the ground that the intent to appeal the judgement from which appeal is sought "cannot be fairly inferred" *from the Notice of Appeal itself*) conflict with the decisions of this Court and the decisions of the Ninth Circuit Court of Appeals (which consider whether such intent can be "fairly inferred" *from the circumstances surrounding the appeal*)?

LIST OF PARTIES

All of the parties are properly identified in the Caption of this case. All corporate Petitioners are not publicly held. International Investment Holdings is the Parent Corporation of Petitioner, Bishop Saxony Corp. d/b/a First Affiliated Securities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ for certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in the above proceedings on August 28, 2002, and the opinion and order denying rehearing entered on October 18, 2002. The issue of whether this Court should tolerate violations of Fed. R. App. P. 36 to accommodate the workload placed on court of appeals clerks is an important question of federal law that has not been, but should be, settled by this Court. In this case such practice may have resulted in an errant summary order which directly conflicts with the rulings of this Court and other circuits.

OPINIONS BELOW

There are no published opinions for which review here is sought. The orders from which Petitioners seek relief appear to be summary orders and are set forth in the Petitioners' Appendix hereto (cited as "App. 1-2, 3-5"). The first order, dismissing the entire appeal was entered on August 28, 2002. App. 1-2. The August 28, 2002 order was not entered in the docket by the Clerk as required by Fed. R. App. P. 36. Instead, the docket entry for the order appears on its face to have been made by Lucille Carr, the Operations Manager for the Court of Appeals. App. 2. ("For the Court Lucille Carr"). The second order, denying a Petition for Rehearing En Banc, denying a Petition for Panel Rehearing, granting in part and denying in part a Motion to Reinstate, and denying the Motion for Reconsideration was entered on October 18, 2002. App. 3-5. Neither of the orders was signed by the Clerk as required by Fed.

R. App. P. 36. Instead, they were signed by the Operations Manager of the Court of Appeals, Lucille Carr.

JURISDICTION

The Operations Manager of the court of appeals entered an order (also signed by the Operations Manager) dismissing the appeal on August 28, 2002. The Operations Manager also signed an order denying Petitioners' Petition for En Banc Rehearing or in the Alternative Petition for Panel Rehearing or Motion to Reinstate or Reconsider on October 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment of the United States Constitution provides in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Federal Rule of Appellate Procedure 36 reads in pertinent part:

FRAP 36. ENTRY OF JUDGMENT; NOTICE

(a) Entry. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court's opinion – but if settlement of the judgment's form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

Federal Rule of Appellate Procedure 45(a) provides in part:

FRAP 45. CLERK'S DUTIES

(a) General Provisions.

(1) Qualifications. The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays.

Federal Rule of Appellate Procedure 3(c)(4) reads:

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

STATEMENT OF THE CASE

1. Factual Background

This lawsuit was filed by the Petitioners in 1995. Seven and one half years later, Petitioners are still awaiting a trial. The underlying facts, in brief summary, are as follows:

Petitioners negotiated a deal to sell First Affiliated Securities, a securities broker-dealer, to the Josephthal Defendants (hereinafter "Respondents"). Respondents made a cash payment that is alleged to have been intended as an advance. The advance was documented with a promissory note. The promissory note was secured with collateral in the form of, among other things, First Affiliated Securities' "customer accounts."

After assurances to the contrary, it is alleged that the Respondents wrongfully called the promissory note and improperly and unlawfully foreclosed on the collateral – the customer accounts of First Affiliated Securities. The Bear Stearns Defendants denied First Affiliated access to these accounts and literally transferred the accounts to the Respondents. It is alleged that, among other wrongdoings, the Bear Stearns Defendants conspired with the Respondents to wrongfully effect this transfer of customer accounts.

After the transfer was effected, and Plaintiff Jonathan E.S. Bekhor discovered the transfer, Mr. Bekhor flew to New York to attend a meeting with the Respondents key principal, Dan Purjes. It is alleged that, under physical and economic duress, Mr. Bekhor was forced to sign a release agreement. It is also alleged that the release

agreement was invalid for reasons other than, but including, the duress.

2. Procedural Background

A. The Summary Judgments And Intent To Appeal.

All Defendants moved for summary judgment. The motions were brought in separate instruments, one by the Respondents and one by the Bear Stearns Defendants. Summary judgment was granted in a single, lengthy order, dismissing all claims against the Respondents on the grounds that they had been previously released. Several of the independent claims against the Bear Stearns Defendants were also dismissed on grounds other than release.

Appeal from the summary judgment at the time of the ruling would not be timely but for certification by the trial court, pursuant to Federal Rule of Civil Procedure 54(b). Shortly after the ruling, Respondents began a push to have the summary judgment rulings regarding both sets of defendants appealed immediately. Lisa Cahill, counsel for Respondents, started this push with a letter to the trial court requesting that the trial court force Petitioners to appeal the summary judgment rulings regarding both sets of defendants immediately, rather than at the conclusion of the trial on the remaining Bear Stearns claims. App. 61-62 (letter of Lisa Cahill dated January 12, 2001). Petitioners responded with a letter to the trial court indicating their preference for a long overdue trial to an intervening appeal. App. 63-65 (letter of Jeffrey Nolan Diamant dated January 12, 2001).

Respondents continued the push with another letter stating: "We, of course, would not oppose Rule 54 certification of an immediate appeal as to the dismissal of the Josephthal Defendants." App. 66-68 (letter of Lisa Cahill dated January 17, 2001).

On February 1, 2001, counsel for both sides attended an "in chambers" conference with the trial court. App. 55 Diamant Aff. ¶ 5. At that conference, both court and counsel for Respondents inquired again about Petitioners' intent regarding appeal from the summary judgment ruling. App. 55 (Diamant Aff. ¶ 5). As claims remain in the underlying action against the Bear Stearns Defendants, Petitioners expressed their desire to only appeal the summary judgment ruling regarding the Josephthal Defendants. At the insistence of counsel for the Defendants, Petitioners agreed to appeal the summary judgment rulings for both sets of defendants. App. 55 (Diamant Aff. ¶ 6).

B. 54(b) Certification

Ultimately, in response to the pressure of the trial court and Respondents' counsel, Petitioners' counsel prepared motions for 54(b) certification for both sets of defendants and submitted them to the trial court. App. 55 (Diamant Aff. ¶ 6). At that time, there was no question among the parties or the court as to the matters to be appealed. Respondents consent to the entry of judgments for the purpose of appealing the dismissal of claims against both the Josephthal and Bear Stearns defendants was emphatically confirmed in a letter by Respondents' counsel. App. 69. Such agreement was acknowledged by Petitioners in a letter to the trial court. App. 91.

After the submission of the agreed 54(b) motions, Respondents waited months for the trial court to grant them. In correspondence to the trial court on July 19, 2001, counsel for Petitioners wrote the court and implored it to rule on the agreed motions. App. 56 (Diamant Aff. ¶ 8) and App. 70-72 (letter of Don Jackson and Stuart Starry dated July 19, 2001). Respondents again therein expressed their intent to appeal the entire summary judgment order of the trial court. *Id.* The trial court finally, on September 4, 2001, by "memo endorsement," granted the motions and requested the submission of 54(b) certification orders. App. 56 (Diamant Aff. ¶ 9) and App. 73-78 (Sept. 4, 2001 Certification Orders Endorsed on Motions).

Respondents took issue with the proposed 54(b) orders and the final versions of the 54(b) orders were *negotiated* by all parties and were the result of at least 2 or 3 prior drafts. App. 56-57 (Diamant Aff. ¶¶ 10 and 11); App. 79, 82-90 (various letters/facsimiles negotiating language of 54(b) orders). ***Suffice it to say, Respondents had substantial involvement in the preparation of the 54(b) orders and knew the full scope of issues to be appealed.***

The trial court finally signed the 54(b) orders and directed the clerk to enter judgment. The court signed a judgment for one set of defendants on March 13, 2002 and another separate judgment for the other set of defendants on March 14, 2002. The final judgments were both entered on March 15, 2002. These judgments were prepared by the court, *not* any counsel in this matter. Confusion was created when **only one judgment was sent to Petitioners by the trial court.** App. 57 (Diamant Aff. ¶ 12); App. 93-95 (Affirmation of Jeff Weinberger, co-counsel for Appellants). The one judgment sent was dated March 14, 2001. App. 57 (Diamant Aff. ¶ 12).

C. The Notice Of Appeal

The Notice of Appeal was filed by the Petitioners on April 12, 2002. App. 57 (Diamant Aff. ¶ 13) and App. 96-98 (Notice of Appeal). The Notice of Appeal referenced Rule 54, and (presumably because of the judgment date) mistakenly referenced an *entry* date as March 14, 2002. *Id.* The language of the notice mistakenly assumed there was only one judgment. *Id.* The notice also referenced a judgment entered on March 14, when in fact, no such judgment existed. *Id.* Seven days later, April 19, 2002, Petitioners filed their required pre-argument statements (including Forms C and D) with the Court of Appeals and again expressed its intent to appeal the summary judgment ruling regarding both sets of defendants. App. 57-58 (Diamant Aff. ¶ 14) and App. 99-109 (appeal information package sent to Second Circuit).

Petitioners were informed of the existence of the second judgment in a letter from Respondents, which attempted to force Petitioners into choosing only one of the judgments as the subject matter of the appeal. App. 110-111 (Letter from Cahill to Starry and Diamant, dated April 30, 2002). The Letter states:

> We are in receipt of your Notice of Appeal. It purports to notice the appeal of a judgment (singular), despite there being two judgments on file. It purports to notice the appeal of a judgment "entered in this action on the 14th day of March 2002" when, in fact, no judgment was entered on that date.
>
> Please let us know which judgment you are purportedly appealing.

Id.

In response to Respondents' letter, Petitioners local counsel, Jeff Weinberger went to the court and discovered that, in fact, two judgments had been entered. App. 57 (Diamant Aff. ¶ 12); App. 93-95 (Affirmation of Jeff Weinberger). This was the first news of this to the Petitioners. *Id.* Counsel for the Petitioners contacted the Second Circuit Court of Appeals and inquired as to whether any action was necessary. App. 59 (Diamant Aff. ¶ 17). Personnel from the Court of Appeals indicated that the Court was aware of Petitioners' intent to appeal the summary judgment ruling (the summary judgment ruling regarding both sets of defendants was included in one global Memorandum and Order, not two) and indicated that no action was necessary because the Court knew that the rulings regarding both sets of defendants were being appealed. App. 59 (Diamant Aff. ¶ 17).

Counsel for Petitioners also contacted the trial court. A clerk of the trial court also indicated that no action was necessary. App. 59 (Diamant Aff. ¶ 18). Nevertheless, the following day, Petitioners filed their "Supplement to Notice of Appeal" and attached the second of two judgments as well as referenced the existence of the two judgments. App. 59 (Diamant Aff. ¶ 18); App. 112-116 (Supplement to Notice of Appeal). The trial court staff contacted counsel for Petitioners and explained that the Supplement to the Notice of Appeal was, in the trial court's mind, really an amendment to the Notice of Appeal and informed Petitioners that he would simply "white-out" the words "Supplement to" and handwrite "Amended." App. 59-60 (Diamant Aff. ¶ 19); App. 117-120 (Amended Notice of Appeal).

D. The Motion To Dismiss

Respondents moved for dismissal, suggesting that the Notice, although timely, only referenced "*one* judgment." App. 121-132. Despite their letter claiming that they did not know which judgment the notice referenced, they were suddenly able to pick one. They argued that the Court of Appeals lacked jurisdiction to "the extent Plaintiffs seek review of the Josephthal judgment."

Petitioners opposed the motion based on longstanding case law and the Rule that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal. . ." Fed. R. App. P. 3(c)(4).

E. The Irregular Docket Entry And Order

The docket entry of the disposition of Appellees' motion to dismiss in the Court of Appeals shows that it was denied. It reads initially as follows:

> Order FILED DENYING motion to dismiss the appeal [2118585-1] by Appellee Josephthal Group, endorsed on motion dated 7/11/02.

App. 138. Not only does this first part of the docket entry indicate CLEARLY that the Motion to dismiss was DENIED, but it indicates the existence of an endorsement to that effect on the motion itself.

Strangely, the remainder of the docket entry is inconsistent with such an endorsement, as it goes on to dismiss the entire appeal, purportedly applying *Daily Mirror, Inc. v. New York News, Inc.*, 533 F.2d 53, 56 (2nd Cir.), *cert. denied*, 429 U.S. 862 (1976) and reciting a short opinion. App. 133-139 (containing additional error "infaired inferred").

Moreover, the docket entry indicates on its face that it was made not by the Clerk of the Court, but by Lucille Carr, the Operations Manager of the Second Circuit Court of Appeals. *Id.* ("For the Court Lucille Carr"). Lucille Carr, not the Clerk, was acting "for the Court" on a substantive motion dismissing an entire appeal.

The order dismissing the appeal tracks the latter part of the docket entry and is also inconsistent with the docket entry denying the motion to dismiss. App. 1-2. The Order makes no distinction between the appeals of the two sets of defendants and fails to recognize that no party requested the dismissal of the Bear Stearns Defendants. App. 121-132. The Order cites only *Daily Mirror*, one case in a line of cases regarding *timeliness* of appeal notices and does not refer to the cases which discuss the descriptive *sufficiency* of a timely notice, which was the issue presented. The order dismissed the entire appeal, even though the Motion to Dismiss requested only the dismissal of the appeal of the claims against the Josephthal Defendants. App. 1-2. A footer on the order suggests that it is a form order, pulled from a file. *See* App. 2 (notation at bottom of order: "USCA Order 4").

F. The Petition For En Banc Rehearing And Order

Because of this highly unusual set of circumstances, Petitioners were concerned that the Motion to Dismiss had not been treated as a *substantive* motion for consideration by a panel. Petitioners were concerned that the appeals court staff had treated the motion as procedural, ruling on their own, without a full hearing by the members of the court. In an effort to ensure that members of the court

would actually see and consider their arguments, Petitioners filed a multipurpose document: a "Petition for En Banc Rehearing or in the Alternative Petition for Panel Rehearing or Motion to Reinstate or Reconsider" (hereinafter "Petition for Rehearing"). App. 6-22.

The Petition for Rehearing specifically set forth why the *Daily Mirror* case did not apply, demonstrated that dismissal was inconsistent with this Court's opinion in *Foman v. Davis,* 371 U.S. 178, 181, 83 S.Ct. 227 (1962), and with the Ninth Circuit's Opinion in *Lynn v. Sheet Metal Workers' International Ass'n.,* 804 F.2d 1472, 1481 (9th Cir. 1986), *aff'd,* 488 U.S. 347, 109 S.Ct. 639 (1989) and the Eighth Circuit's opinion in *McAninch v. Traders National Bank of Kansas City*, 779 F.2d 466, 467 n.2 (8th Cir. 1985), *cert. denied,* 476 U.S. 1182, 106 S.Ct. 2917 (1986). App. 6-22.

Surprisingly, the resultant order was no more specific than the first order. App. 3-5. It was again signed by the court's operations manager and not by the clerk. *Id.* It cited no case authority whatever. *Id.* Its reasoning consisted solely of a blanket regurgitation of the terms of Fed. R. App. P. rules 35 and 40:

> . . . plaintiffs have not demonstrated that "en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or . . . the proceedings involve a question of exceptional importance," nor that the previous order overlooks or misapplies controlling law." Fed. R. App. P. 35(a)(1)-(2), 40(a)(2).

Id. Again, a footer on the order suggested that it was the same form order. *See* App. 5 (notation at bottom of order: "USCA Order 4").

The Order on Petition for Rehearing is inconsistent with the initial order dismissing the entire appeal. The prior order, dismissed the entire appeal based on the "fairly inferred" passage of the *Daily Mirror* case. App. 1-2. The order on Petition for Rehearing inexplicably reinstates the appeal of the Bear Stearns portion of the Appeal because dismissal of that portion was "not warranted at that time." *Id.* Finally, the order on Petition for Rehearing (ironically signed by a staff member of the clerk's office) orders the same staff to amend the purportedly erroneous docket entry. *Id.*

REASONS FOR ALLOWANCE OF THE WRIT

1. Departure From The Accepted And Usual Course Of Proceedings

Federal Rule of Appellate Procedure 36 reads in pertinent part:

> **FRAP 36. ENTRY OF JUDGMENT; NOTICE**
>
> **(a) Entry.** A judgment is entered when it is noted on the docket. The clerk ***must*** **prepare, sign, and enter** the judgment:
>
> (1) after receiving the court's opinion – but if settlement of the judgment's form is required, after final settlement; or
>
> (2) if a judgment is rendered without an opinion, **as the court instructs.**

Fed. R. App. P. 36 (emphasis added). Both the order dismissing the appeal and the order denying the petition for rehearing violate this rule. Neither is signed by the clerk. It appears from the docket sheet, that the order

dismissing the appeal, was neither prepared by the clerk nor entered on the docket by the clerk. Moreover, it also appears from the docket sheet that the court instructed the *denying* of the motion to dismiss.

On the face of the Rule, there is nothing to suggest that the duty to sign is delegable to another staff member. The language of the rule is plain. To violate Rule 36 is to depart from the accepted and usual course of proceedings. The advisory committee notes made at the Rule's adoption in 1967 indicate so. The advisory committee notes begin by stating as follows:

> **This is the typical rule.** *See* 1st Cir. Rule 29 [rule 29, U.S.Ct. of App. 1st Cir.]; 3d Cir. Rule 32 [rule 32, U.S.Ct. of App. 3rd Cir.]; 6th Cir. Rule 21 [rule 21, U.S.Ct. of App. 6th Cir.].

Fed. R. App. P. 36 Advisory Committee Notes (West 2002) (emphasis added).

In all likelihood the violation of this rule is a case of first impression. Whether it should be allowed merely to accommodate our court system's ever-increasing case load is an important question of federal law that has not been, but should be, decided by this Court. Counsel for Petitioners have found little discussion of the rule in cited authority. However, the discussion of the Rule in at least one federal practice treatise indicates the purpose of the rule is to, in part, accommodate this Court's requirement of "reproducing the judgment in the appendix." *See* Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 3982, n.7. Wright, Miller, Cooper & Gressman suggest that the rule is to preserve evidence of judicial action. They state: "The parties should in any event receive copies of all orders, judgments, opinions, and

other evidences of judicial action in their cases." *Id.* Here, the problem is that Petitioners have no reliable evidence of "judicial action." The only evidence of ***judicial action*** provided to Petitioners is a docket entry which suggests that the Appeals Court instructed the DENIAL of the Motion to Dismiss the Appeal. Unfortunately, the order GRANTED the motion and dismissed the appeal, and evidenced only ***clerical action***, not judicial action.

Fundamental to Procedural Due Process is *notice* and an *opportunity to be heard*. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972).

> It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'

Id. (citation omitted). Under these circumstances, Petitioners are left wondering whether their arguments were ever heard by the Court. Petitioners are by no means accusing anyone of foul play. Nevertheless, the fact that the order ignores most of the relevant case law suggests to Petitioners that they were not heard by the Court, and were the victims of mass-produced, assembly line justice. This is hardly the "meaningful manner" contemplated by *Fuentes*. Had Petitioners known that their extensive briefing would result in an order that appeared to be ruled upon by staff members, they would have asserted their right to oral argument on substantive motions and forgone the submission process. *Petitioners had no notice that their reliance on the submission process alone would leave them wondering whether any member of the appeals court even heard their argument.*

The Rule 36 requirement of the Clerk's own signature and handling is a protection against unwarranted usurpation of judicial authority by administrative personnel. The Clerk of the Court is the only non-judge in whom there is vested any significant powers. Only the Clerk is required to take an oath and post a bond. Fed. R. App. P. 45(a)(1). When the Court of Appeals is open, the Rules require that a Clerk or a Deputy Clerk be in attendance. Fed. R. App. P. 45(a)(2). To allow other personnel to sign opinions and orders of the Court of Appeals upsets the checks and balances intended by the Rules and required by Due Process. Most prudent business owners require checks to be signed by a principal of the company, or a specifically authorized accountant or bookkeeper. Only a foolish business owner would allow any of its employees to sign company checks. Rule 36 was put in place no doubt because of similar concerns. This court should ensure that only duly authorized court clerks act in a quasi-judicial capacity.

Procedural Due Process requires minimum requisite indicia of trustworthiness. A substantive order, dismissing an appeal, signed by a mere court administrator contains no such indicia. This Court should issue a writ of certiorari and consider issuing an order to the Court of Appeals requiring that the Petition for Rehearing be heard by at least a three (3) Judge panel, and more appropriately (given the arguments below) by the entire Court of Appeals. This Court should require the Court of Appeals to issue an order which, on its face, evidences the fact of the hearing and the consideration of Counsel's argument and authorities.

2. Conflict With The Decisions Of This Court And The Decisions Of The Ninth Circuit Court Of Appeals

The order dismissing the appeal of August 28, 2002 (App. 1-2) and the order denying rehearing of October 18, 2002 (App. 3-5) combine in an illogical manner and conflict with the decisions of this Court and Other Circuits.

A. The Order Dismissing The Appeal

As its sole authority for dismissal, the August 28 order cites (but misstates) mere dicta from the Second Circuit's *Daily Mirror, Inc. v. New York News, Inc.*, 533 F.2d 53 (2nd Cir.), *cert denied*, 429 U.S. 862 (1976).

In that case the trial court had granted summary judgment on June 9, 1975. *Id.* at 55. Rather than file a notice of appeal, the plaintiff moved to vacate pursuant to Fed. R. Civ. P. 60(b). Under the applicable law, the filing of such motion did not toll the time for filing a notice of appeal on the summary judgment as required by Fed. R. Civ. P. 4(a). *Id.* at 56. On July 3, the court denied the motion to vacate. On July 29, the plaintiff did file a notice of appeal which referred only to the July 3 order. *Id.* Had it referred to the June 9 order, it would have been untimely nevertheless. *Id.* The Court of Appeals correctly ruled that the notice was untimely as to the June 9 order. *Id.* However, the court indicated that had the notice been filed on time, that the result might have been different, despite the fact that the notice failed to reference the June 9 order:

> While a mistake in designating the judgment appealed from is not invariably fatal so long as the

> intent to appeal from a specific judgment can be fairly inferred, *Foman v. Davis,* 371 U.S. 178, 181-82, 83 S.Ct. 227, 229-30, 9 L.Ed.2d 222, 225 (1962); *Terkildsen v. Waters,* 481 F.2d 201, 206 (2d Cir. 1973), **plaintiff's noncompliance with Fed.R.App.P. 4(a) prevents it from benefiting from this liberal standard.** A motion for relief under Rule 60(b) does not terminate the running of the time for appeal set forth in Rule 4(a), *Pulliam v. Pulliam,* 156 U.S.App.D.C. 25, 478 F.2d 935, 937 n.6 (1973); 9 J. Moore, Federal Practice P 204.12(1) (2d ed. 1973).[FN4] Consequently the July 29 notice of appeal was not timely filed with respect to the June 9 decision.

Id. (emphasis added). While the underscored portion of this quoted passage appears to be what is referred to by the Court below in its August 28 order dismissing Petitioners' appeal, it was the **bolded** portion of the quoted passage which formed the basis of the *Daily Mirror* court's ruling. *See* August 28 Order, App. 1-2 (*"fairly inferred"*).

Here, there is no contention that the Notice of Appeal was untimely. The holding of *Daily Mirror* does not apply here. Only the dicta applies. This dicta does nothing to define the criteria for deciding what type of circumstances do and do not support such a fair inference. As will be shown below, under the facts presented to the Court of Appeals, such an inference could be drawn had the Court of Appeals considered the evidence and authorities.

Most importantly, the August 28 order adds a dispositive criterion not found in the *Daily Mirror* dicta, which is inconsistent with established law. The August 28 order requires that the fair inference of intent to appeal be drawn "from" Appellants' "original notice of appeal," when

no such requirement is mentioned in *Daily Mirror*. *See* August 28 order, App. 2. In fact, *Daily Mirror* cites this Court's opinion in *Foman v. Davis*, 371 U.S. 178, 181-82, 83 S.Ct. 227, 229-30, 9 L.Ed.2d 222, 225 (1962) which infers such intent from the totality of the circumstances. *See Foman* discussion, *infra*.

B. The Order Denying Rehearing

In addition to flatly denying the Petitions for Panel Rehearing and En Banc Rehearing, the second order inexplicably reinstates the appeal of the Bear Stearns portion of the Appeal because dismissal of that portion was "not warranted at that time." App. 4. This makes absolutely no sense in view of the grounds for the first order. Recall that the Notice of Appeal failed to specifically reference either of the two judgments. As such its failure to reference the Bear Stearns Judgment was equally powerful as its failure to reference the Josephthal Judgment. If indeed no fair inference could have been made from this failure to specify, the entire appeal should have remained dismissed. In the alternative, if dismissal of the Bear Stearns appeal was "not warranted," then neither was the dismissal of the Josephthal appeal. If this order is read literally, it appears that the Court of Appeals lacked jurisdiction over the Josephthal appeal, simply because the Respondent moved for dismissal, not because it was "warranted."

C. Standard Of Review Considered

Petitioners are cognizant of this Court's review standards and that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous

factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This case meets the standard.

The August 28 order fails to properly state the rule of law. It cites only dicta, edits the dicta incorrectly, and as such states a proposition of law which conflicts directly with *Foman v. Davis*. *See Foman* discussion, *infra*. It also conflicts with opinions in at least two other circuits. Each of these legal conflicts satisfy separate criteria for granting the petition.

Although the first question presented is sufficient for granting the petition, in combination with the form of the orders and the legal mistakes therein, to deny the petition would allow a particularly harsh and increasingly common injustice. To permit Court of Appeals staff to issue orders which ignore the facts, incorrectly decide the case, and still avoid the review of this court simply because they seemed to state a boilerplate proposition of law would sanction judicial despotism. With the dockets of the Courts of Appeals becoming increasing crowded, the temptation to dismiss cases on summary order, without discussing the grounds therefore may be great. This Court's standards for review of legal questions assumes that the court below has in place a process which assures full consideration of argument of counsel and authority presented. When it is questionable from the language of summary orders that such review has taken place, this Court's supervision must be invoked. Otherwise an insidious denial of due process may be allowed to creep into our justice system.

D. Conflict With The Rulings Of This Court

The Court of appeals decision squarely conflicts with *Foman v. Davis,* 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). In *Foman*, the Petitioner sought to claim partial benefits of an estate in District Court on the basis of an oral agreement. The respondent had filed a motion to dismiss on statute of frauds grounds. The District Court agreed with respondent and issued an order on December 19, 1960 dismissing the complaint. *Id.* at 179. On December 20, petitioner filed motions to vacate the judgment and to amend the complaint to add quantum meruit grounds. On January 17, petitioner filed a notice of appeal from the December 19 judgment. On January 23, the District Court denied the motions to vacate and amend. On January 26, petitioner filed a second notice of appeal from the denial of the two motions. On appeal, the Court of Appeals dismissed the appeal as to the summary judgment order. The appeals court treated the first notice as premature and of no effect. *Id.* at 180.

> The Court of Appeals held the second notice of appeal, filed January 26, 1961, ineffective to review the December 19, 1960, judgment dismissing the complaint because the notice failed to specify that the appeal was being taken from that judgment as well from the orders denying the motions.

Id. at 180-181.

This Court reversed, stating: "Even if this made the first notice premature, we must nonetheless reverse for we believe the Court of Appeals to have been in error in so narrowly reading the second notice." *Id.* at 181. This Court continued:

> [2] The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. **Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest.**

Id. (emphasis added). Likewise, the record put before this Court here shows that there is *virtually no chance* that Respondents did not know what Petitioners intended to appeal. *See* Statement of Case, *supra* (parts B 1 and B 2). Respondents not only initiated the push to appeal both orders together, they participated in every step of drafting the tandem Rule 54 motions for certification.

Respondents' April 30, 2002 letter requesting clarification is transparent. It is nothing more than skillful gamesmanship. The letter noted Petitioners' misstep and attempted to force Petitioners into a box based on a mere technicality. The letter bears repeating, as it demonstrates Respondents' precise knowledge of the judgments and Respondents' attempt to seize the day:

> We are in receipt of your Notice of Appeal. It purports to notice the appeal of a judgment (singular), despite there being two judgments on file. It purports to notice the appeal of a judgment "entered in this action on the 14th day of March 2002" when, in fact, no judgment was entered on that date.

> Please let us know which judgment you are purportedly appealing.

App. 110-111.

In *Foman*, this Court rejected the concept of deciding cases on such tactical maneuvers:

> [3] It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1.

Id., at 181-182. The Court of Appeals, decision to dismiss the Josephthal Appeal should be reviewed by this Court. It requires intent to be inferred solely from the original notice of appeal. This is flatly contrary to the holding in *Foman*.

E. Conflict With The Rulings Of The Eighth And Ninth Circuits

Respondents urge this Court to consider *Lynn v. Sheet Metal Workers' International Ass'n,* 804 F.2d 1472, 1481 (9th Cir. 1986), *aff'd,* 488 U.S. 347, 109 S.Ct. 639 (1989). In *Lynn*, the Ninth Circuit addressed a very similar situation as here: *two judgments had been entered*, all

appellants notified of their intent to appeal, but *only notified of their intent to appeal one of the two judgments. Id.*

The Ninth Circuit noted that "a mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake." *Id.* The court, applied a two part test: (1) whether the affected party had notice of the issue on appeal; and (2) whether the affected party had an opportunity to fully brief the issue. *Lynn v. Sheet Metal Workers' International Ass'n,* 804 F.2d 1472, 1481 (9th Cir. 1986), *aff'd,* 488 U.S. 347, 109 S.Ct. 639 (1989) The court noted that the appellants briefed the issue, filed a joint brief with the issue fully discussed, and thus, appellee had notice of the issue. *Id.* As such, the court found no prejudice to appellee and heard the appeal. *Id.*

The language of *Lynn* when compared to the August 28, 2002 order here demonstrates precisely why the August 28 order conflicts with *Lynn* and why the August 28 order fails to properly state the rule of law. In *Lynn*, the two part test setting forth matters from which intent to appeal can be "fairly inferred" ***do not*** come from the face of the notice of appeal: 1) Notice of the issues, and 2) opportunity to brief them. The August 28 order here however, requires that the inferences be drawn from the notice of appeal itself:

> This court has determined that it lacks jurisdiction over this appeal because it cannot be "fairly inferred" **from the plaintiff-appellants' original notice of appeal** that the judgment sought to be appealed was the district court judgment relating to the plaintiff-appellants' claims against the defendants.

App. 2 (emphasis added). The conflict between these two approaches must be reconciled by this Court.

In *McAninch v. Traders National Bank of Kansas City*, appellees alleged that a single notice of appeal filed in two consolidated cases did not specify that appeal was being taken from the granting of a summary judgment regarding certain parties nor did it specify that appeal was being taken from an order dismissing another party. 779 F.2d 466, 467 n.2 (8th Cir. 1985), *cert. denied,* 476 U.S. 1182, 106 S.Ct. 2917 (1986). Noting the policy to construe notices of appeal liberally where intent is apparent and no prejudice is suffered, the court held that intent to appeal the summary judgment ruling was apparent from the filing of a premature notice and inclusion of the order on the appeal information form. *Id.* The court also held intent to appeal the order dismissing the other party was apparent "given the procedural history of the case, the listing of Albia on the caption of the notice of appeal, and the inclusion of the order on the appeal information form." *Id.* This latter holding is based upon facts nearly identical to those here.

Here, the procedural history of the case certainly indicated an intent to appeal the Josephthal Summary Judgment rulings. The caption on the notice of appeal included the Josephthal Defendants (Respondents herein). Here, the case information form included the entire summary judgment order and an attachment thereto specifically stated: "The Plaintiffs will appeal the Court's summary judgment rulings with respect to both the Josephthal Defendants and the Bear Stearns Defendants." It is apparent that the Eighth Circuit would have ruled differently here.

Again, the *McAninch* court's criteria for inferring intent do not lie on the face of the notice as required by the August 28, 2002 order here. The rule of law as stated in the August 28, 2002 order conflicts with *McAninch*.

The issue of whether a notice of appeal can be interpreted in the overall context of the procedural history of the case as opposed to being interpreted in a vacuum is a very important issue. It goes to the very heart of appellate jurisdiction and determines the fates of litigants. The conflict between the August 28 order and the *Lynn* and *McAninch* cases must be resolved by this Court.

F. Conflict With The Rulings Of The Second Circuit

It should be noted that the August 28 order also conflicts with established case law of the Second Circuit. *See* briefs in lower court, App. 6-22 and App. 29-52. However, since such conflict is not a basis for review by this Court, such argument has been omitted here. The August 28 order (as affirmed by the August 18 order) is simply a bizarre aberration which has resulted in a great injustice. This could easily be corrected by a *Per Curiam* order of this Court.

CONCLUSION

This Court should weigh the consequences of allowing routine violations of Federal Rule of Civil Procedure 36. Without strict enforcement of the rule, a crack in the foundation of procedural due process will surely grow. Expedience is no excuse for failing to ensure that those who come to this Nation's Courts seeking justice, are

actually given an opportunity to be heard by learned legal scholars. Removing the singular, oath-based link between members of the court and their duly qualified clerks, will surely increase the risk of mass produced form orders – bureaucrats administering justice rather than judges. Here, it appears that this link was broken, resulting in an erroneous, hyper-technical order which is inconsistent with fair play and substantial justice.

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'

Foman v. Davis, 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (citation omitted).

Respectfully submitted,

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S.D.N.Y.
96-CV-4156
McKenna, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th Day of Aug. Two thousand two,

(Filed Aug. 28, 2002)

Present:

Hon. Richard J. Cardamone,
Hon. Chester J. Straub,
Hon. Robert A. Katzmann,
Circuit Judges.

Jonathan E.S. Bekhor, *et al.*,

Plaintiffs-Counter-
Defendants-Appellants,

v. 02-7401

Josephthal Group, Inc., *et al.*,

Defendants-Counter-
Claimants.

Plaintiffs appeal, pursuant to a Fed. R. Civ. P. 54(b) certification order, the district court order granting the

defendants' motion for summary judgment. Defendants move to dismiss the appeal as untimely. This Court has determined that it lacks jurisdiction over this appeal because it cannot be "fairly inferred" from the plaintiff-appellants' original notice of appeal that the judgment sought to be appealed was the district court judgment relating to the plaintiff-appellants' claims against the defendants. *Daily Mirror, Inc. v. New York News, Inc.*, 533 F.2d 53, 56 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976). Moreover, the plaintiff-appellants' amended notice of appeal is untimely pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure. Therefore, it is ORDERED that the appeal is dismissed.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr

S.D.N.Y.
96-CV-4156
McKenna, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th Day of Oct. Two thousand two,

(Filed Oct. 18, 2002)

Present:

Hon. Richard J. Cardamone,
Hon. Chester J. Straub,
Hon. Robert A. Katzmann,
Circuit Judges.

Jonathan E.S. Bekhor; International Investment Holdings, Inc.; Bishop Saxony Corp. dba First Affiliated Securities, Inc.;

Plaintiffs-Counter-Defendants-Appellants,

v.

02-7401

Josephthal Group, Inc., a corporation; Josephthal Holdings, Inc., a corporation; Josephthal, Lyon & Ross, Incorporated, a corporation; Dan Purjes, an individual; Bear Stearns & Co., Inc., a corporation;

Bear Stearns Securities Corp., a corporation;

Defendants-Counter-Claimants-Appellee.

Plaintiffs have filed a "petition for en banc rehearing, or in the alternative petition for panel rehearing or motion to reinstate or reconsider" this Court's August 28, 2002 order granting the motion by defendants Josephthal Group, Josephthal Holdings, Josephthal, Lyon & Ross, and Dan Purjes to dismiss the plaintiffs' appeal, pursuant to a Fed. R. Civ. P. 54(b) certification order. of the district court order granting the defendants' motion for summary judgment.

Upon due consideration, it is hereby ORDERED that the petition for an en banc rehearing or panel rehearing is denied, as plaintiffs have not demonstrated that "en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or . . . the proceeding involves a question of exceptional importance," nor that the previous order overlooks or misapplies controlling law. Fed. R. App. P. 35(a)(1)-(2), 40(a)(2). The motion for reinstatement is granted for the limited purpose of reinstating the plaintiffs' appeal as against Bear Stearns & Co., Inc. and Bear Stearns Securities Corp as the dismissal of that portion of the appeal was neither sought nor warranted at that time. Plaintiffs' motion for reconsideration is denied. The Clerk's Office of this Court is directed to amend the docket sheet to accurately reflect the August 28, 2002 order of this Court granting the above-mentioned motion to dismiss.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr

No. 02-7401

United States Court of Appeals
for the
Second Circuit

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC., BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES, INC.,

Plaintiffs-Counter-Defendants-Appellants,

-against-

JOSEPHTHAL GROUP, INC., a corporation; JOSEPHTHAL HOLDINGS, INC., a corporation; JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual BEAR STERNS & CO., INC., a corporation and BEAR STEARNS SECURITIES CORP., a corporation,

Defendants-Counter-Claimants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR EN BANC HEARING OR IN THE ALTERNATIVE PETITION FOR PANEL REHEARING OR MOTION TO REINSTATE OR RECONSIDER

WARE, SNOW, FOGEL & JACKSON, LLP
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PETITION FOR EN BANC REHEARING OR IN THE ALTERNATIVE PETITION FOR PANEL REHEARING OR MOTION TO REINSTATE OR RECONSIDER

Appellants Jonathan E.S. Bekhor, International Investment Holdings, Inc. and Bishop Saxony Corp. d/b/a First Affiliated Securities petition this Court for en banc rehearing of the Court's decision to dismiss the appeal or, in the alternative, petition for panel rehearing or move this Court to reinstate the appeal or reconsider its ruling regarding same.

EN BANC STATEMENT

The Panel's decision in this case conflicts with rulings from the United States Supreme Court and this Court as well as other circuits applying the same rules recited herein. Such decisions are: *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227 (1962); *Krause v. Bennet*, 887 F.2d 362, 367 n.2 (2nd Cir. 1989); *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2nd Cir. 2001); *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111, 114 n.1 (2nd Cir. 2000); *Lynn v. Sheet Metal Workers' International Ass'n.*, 804 F.2d 1472, 1481 (9th Cir. 1986), *aff'd*, 488 U.S. 347, 109 S.Ct. 639 (1989) and *McAninch v. Traders National Bank of Kansas City*, 779

F.2d 466, 467 n.2 (8th Cir. 1985), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2917 (1986).

I. PROCEDURAL BACKGROUND

This case has been vigorously litigated for nearly eight years. Nearly two years ago, the trial court granted summary judgment, dismissing the Josephthal Defendants (Josephthal Group, Inc., Josephthal Holdings, Inc., Josephthal Lyon & Ross, Inc., and Dan Purjes) and dismissing several claims against the Bear Stearns Defendants (Bear, Stearns and Co., Inc. and Bear Stearns Security Corp.). Exhibit 1, Tab A. Ultimately, after more than a year of dialogue, the Defendants and Plaintiffs agreed on the certification of certain issues to be appealed to this Court. This included appeal of the Josephthal dismissal. Defendants' counsel wrote to the trial court stating: "We, of course, would not oppose Rule 54 certification of an immediate appeal as to the dismissal of the Josephthal Defendants." Exhibit 1, Tab D. The trial court granted agreed Rule 54(b) certification motions.

Only one order was issued granting the summary judgment. Exhibit 1, Tab A. Only one judgment was provided by the trial court to the plaintiffs, **dated** March 14th 2001. Exhibit 1, Tab L. Plaintiffs timely filed a notice, which mistakenly mis-described the subject matter of the appeal as "the judgment **entered** March 14, 2002," when in fact there were two judgments entered March 15, 2002 – one dated March 14th, 2002 and the other dated March 13, 2002. It was later discovered that the judgment provided by the trial court only applied to the Bear Stearns Defendants and another judgment (unbeknownst to Appellants) had been entered regarding the Josephthal

Defendants. No notice of that judgment was ever given to Appellants. Exhibit 1, Tab L.

On its face the Notice of Appeal referenced only one judgment, and erroneously assumed that only one judgment existed. Appellants were informed of the existence of the second judgment in a letter from Appellees, which attempted to force Appellants into choosing only one of the judgments as the subject matter of the appeal, after the time for notice had expired. Exhibit 1, Tab O. The Letter states:

> [Your Notice of Appeal] purports to notice the appeal of a judgment (singular), despite there being two judgments on file . . .
>
> Please let us know which judgment you are purportedly appealing.

Id. Although both the trial court personnel and the personnel of this Court indicated that Appellants need do nothing, Appellants immediately filed a supplement to their Notice of Appeal out of an abundance of caution. Exhibit 1, Tab P. The supplement bore the title "Supplement to Notice of Appeal." *Id.* A clerk in the trial court "whited-out" the words "Supplement to" and hand wrote "Amended" in its stead. *Id.* at Tab Q.

The Josephthal Defendants moved for dismissal, suggesting that the Notice, although timely, only referenced "*one* judgment." Exhibit 1, p. 5. Despite their letter claiming that they did not know which judgment the notice referenced, they now are able to pick one. They argued that this Court lacked jurisdiction to "the extent Plaintiffs seek review of the Josephthal judgment." *Id.*

Appellants opposed based on longstanding case law and the Rule that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal . . . " F.R.A.P. 3(c)(4).

The docket entry of this Court shows that Appellees' motion to dismiss was denied. It reads in pertinent part:

> Order FILED DENYING motion to dismiss the appeal [2118585-1] by Appellee Josephthal Group, endorsed on motion dated 7/11/02.

Exhibit 4. The remainder of the docket entry is completely inconsistent with the denial of the motion, as it goes on to dismiss the entire appeal. *Id* (containing additional error "infaired inferred"). The order dismissing the appeal tracks the latter part of the docket entry and is, needless to say, not consistent with the docket entry denying the motion to dismiss.

Ironically, the order dismissed the entire appeal. Exhibit 3. The Order makes no distinction between the appeals of the two sets of efendants [sic] and fails to recognize that no party requested the dismissal of the Bear Stearns Defendants. *Id.* The Order cites only one case in a line of cases regarding *timeliness* of appeal notices and does not refer to the cases which discuss the descriptive *sufficiency* of a timely notice, which is the issue here. Because of this highly unusual set of circumstances, Appellants seek rehearing of this dismissal and reinstatement of the appeal as to both sets of Appellees.

II. SUMMARY OF ARGUMENT

The Order should be reviewed, and the entire appeal should be reinstated. The discrepancy between the order (dismissing the appeal) and the Court's docket entry (denying the motion to dismiss the appeal) warrants a complete review. The Order's cited authority is inapplicable to this case. Additionally, the Order suggests that the issues and law cited in Appellants' Response to the Motion was overlooked or misapprehended.

The first-filed notice of appeal was adequate and entitled to liberal construction. Intent to appeal the summary judgment ruling regarding the Josephthal Defendants was not only inferrable, but actually known to Appellees as the appeal was being pursued at their insistence. All the Rule 54(b) documentation was a negotiated product and none of the Appellees will suffer prejudice by permitting the appeal. Lastly, case law supports the amending of a notice of appeal.

III. ARGUMENT

A. The Order's Cited Authority is Inapplicable to this Case.

The Court's Order relies on *Daily Mirror, Inc. v. New York News, Inc.*, 533 F.2d 53, 56 (2nd Cir.), *cert denied*, 429 U.S. 862 (1976) when it states that "it cannot be 'fairly inferred' from the plaintiff-appellants' original notice of appeal that the judgment sought to be appealed was the district court's judgment relating to the plaintiff-appellants' claims against the defendant" and dismisses the appeal as to all defendants. Exhibit 3. There is no question that an untimely notice deprives the appellate

court of jurisdiction. But this is not an issue of failure. Rather, it is one, if anything, of adequacy.

Daily Mirror is a case of complete "failure" to timely notice an appeal. In fact, the court in *Daily Mirror* recognizes that a mistake in designating the judgment appealed from is not invariably fatal. *Id.* The issue facing the court was that the appellant in that case failed to timely notice any appeal as it mistakenly believed that moving for relief under Federal Rule of Civil Procedure 60(b) terminated the running of time for appeal set forth in Federal Rule of Appellate Procedure 4(a). *Id.* Appellant in *Daily Mirror* filed its notice of appeal on July 29, from the court's order of June 9 – clearly a complete "failure" to designate.

In this case, however, Appellants' notice was undisputedly timely. Appellees here claim that the first-filed notice somehow noticed an appeal of only the Bear Stearns Judgment and was ineffective regarding the Josephthal Judgment. Appellants argued that the notice was sufficient to properly and timely notice the appeal from both judgments. As such, this issue is only properly reviewed under the cases pertaining to "adequacy" of the notice. *Daily Mirror* is not such a case.

B. The Controlling Law Presented in Appellants' Response was Overlooked or Misapprehended.

Each of the cases relied upon by Appellees, as well as the case relied upon in the August 28 Order, deal with the issue of the failure to timely notice appeal.[1] Relying on

[1] Appellants considered the argument that this Court found the original notice of appeal to be insufficient to confer this Court with

(Continued on following page)

such authority manifests either the overlooking or misapprehending of the controlling law. The analogous cases from this Court and other Federal Circuits treat similar fact patterns under an "adequacy" analysis, not a "failure" analysis.

The United States Supreme Court has set the tone for challenges to an appeal based on the "adequacy" of the notice of appeal. In *Foman v. Davis*, the Court stated that notices of appeal are entitled to a liberal construction where the intent of the appellant is apparent and the adverse party is not prejudiced. 371 U.S. 178, 181, 83 S.Ct. 227 (1962). In explaining the Court's flexible approach, the Court wrote, "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Id.*

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jurisdiction to hear any appeal. But given the treatment of notices of appeal by this Court in the last few years, (*Krause, D'Amato, Alfaro, Haugen* and *Boguslavsky*, discussed in detail in this Section), and given the Supreme Court's policy of liberal construction of notices of appeal, Appellants do not interpret the August 28 Order as holding such. To the extent that it does, Appellees would submit that the original notice is more than adequate. Even if the notice contains an incorrect date, it clearly references Rule 54(b) and judgment, which more than fairly infers what Appellants are appealing. It is also Appellants understanding through recent conversations with their counsel and the Court's staff that Appellees do not contest that the original notice of appeal confers jurisdiction to at least hear the Bear Stearns Appeal. As such, the rest of this motion addresses the appeal regarding both sets of Defendants.

1. Liberal Construction.

The Second Circuit has taken literally the Supreme Court's statement that notices of appeal are to be construed liberally. This Court has actually considered documents other than notices of appeal to constitute a notice of appeal. In *Haugen v. Nassau County Dept. of Social Services*, this Court found a letter from the social services department to the court requesting an extension of the time to appeal as a notice of appeal simply because it indicated that the social services department intended to appeal. 171 F.3d 136, 138 (2nd Cir. 1999). In *Boguslavsky v. South Richmond Securities*, this Court deemed appellant's brief on appeal sufficient to provide notice of appeal. 225 F.3d 127, 129 (2nd Cir. 2000). The August 28 Order does not follow the policy of liberal construction, particularly considering the analogous cases. As Appellees presented examples of other documents sufficient to give notice of intent to appeal, this Court should not overlook these documents as instruments that can, or did, confer jurisdiction over this appeal. Exhibit 1, Response p. 11 and tabs E and G.

2. Intent and Prejudice.

This Court's opinion in *Krause v. Bennet* sets the groundwork for the necessary analysis of this case. In determining whether this Court could, or should, hear an appeal where the Notice of Appeal referenced a different order completely, this Court permitted the appeal finding: (1) the intent to appeal the correct order was apparent; and (2) the appellee suffered no prejudice due to the inaccuracy of the notice. 887 F.2d 362, 367 n.2 (2nd Cir. 1989). Subsequent cases in this Court reached the same result. *See, e.g., D'Amato v. Deutsche Bank*, 236 F.3d 78

(2nd Cir. 2001) (permitting appeal even though notice referenced memorandum opinion, which was inaccurate); *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111, 114 n.1 (2nd Cir. 2000) (holding appeal should be permitted where notice referred to an order denying a post-trial motion and not final judgment because intent was apparent and appellee was not misled or prejudiced by technical defect).

a. Intent to Appeal Ruling Regarding Josephthal Defendants is Apparent.

Not only can intent to appeal the rulings regarding both sets of Defendants be fairly inferred, Appellants have had ***actual knowledge*** of Appellee's intent to appeal the summary judgment ruling as to all Defendants. In fact, it was Appellees' push to effect the appeal regarding both sets of defendants that ultimately resulted in Appellants' acquiescence to same.

Appellants' original briefing provides substantial detail regarding the history of this appeal. Exhibit 1, Response pp. 3-5. This history clearly delineates an appeal on both judgments brought at the insistence of Appellees and ultimate acquiescence of Appellants. Counsel for Appellees not only negotiated the final versions of all the Rule 54(b) paperwork (both motions and orders), but they pushed the trial court to force the appeal regarding both sets of defendants. Further, upon Appellants' initial acquiescence to taking the interlocutory appeal, they only agreed to appeal the *Josephthal* claims (after Appellants so acquiesced, Appellees also insisted that the Bear Stearns Claims be appealed as well). Appellants' original briefing attached correspondence from Appellees demonstrating their actual knowledge and insistence, which is a

major factor for consideration in the cases on this issue. For additional detail, Appellants would urge the Court to consider their original briefing, Exhibit 1, Response Sections II and IV(B).

Equally as important, because all parties agreed to 54(b) certification, and the Notice of Appeal referred to Rule 54, intent to appeal the summary judgment rulings regarding both defendants can certainly be inferred from the Notice of Appeal. The Notice of Appeal not only referred to Rule 54, but designated all Plaintiffs in the underlying action as parties taking the appeal and, as noted, the 54(b) motions themselves as well as correspondence from Appellants' counsel to the trial court on July 19, 2001 (imploring the trial court to rule on the agreed motions so Appellants could take their appeal) expressed Appellants' intent to appeal the summary judgment rulings for both sets of defendants.

b. Case Law Supports Appellants' Position.

***Lynn* and *McAninch*.** Appellants urge this Court to strongly consider the following two cases and submit that their holdings are on point and cannot be ignored. The first is *Lynn v. Sheet Metal Workers' International Ass'n.*, 804 F.2d 1472, 1481 (9th Cir. 1986), *aff'd*, 488 U.S. 347, 109 S.Ct. 639 (1989). In *Lynn*, the Ninth Circuit addressed this issue *where two judgments were entered*, all appellants notified of their intent to appeal, but *only notified of their intent to appeal one of the two judgments. Id.*

The Ninth Circuit applied the same test applied by this Court when it noted that "a mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly

inferred and the appellee is not prejudiced by the mistake." *Id.* The court noted that the appellants briefed the issue, filed a joint brief with the issue fully discussed, and thus, appellee had notice of the issue. *Id.* As such, the court found no prejudice to appellee and heard the appeal. *Id.* This case should not be treated any differently.

Second, in *McAninch v. Traders National Bank of Kansas City*, appellees alleged that a single notice of appeal filed in two consolidated cases did not specify that appeal was being taken from the granting of a summary judgment regarding certain parties nor did it specify that appeal was being taken from an order dismissing another party. 779 F.2d 466, 467 n.2 (8th Cir. 1985), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2917 (1986). Noting the policy to construe notices of appeal liberally where intent is apparent and no prejudice is suffered, the court found intent to appeal the summary judgment ruling apparent from the filing of a premature notice and inclusion of the order on the appeal information form. *Id.* The court found intent to appeal the order dismissing the other party apparent "given the procedural history of the case, the listing of Albia on the caption of the notice of appeal, and the inclusion of the order on the appeal information form." *Id.*

In this case, in addition to Appellees' actual knowledge of Appellants' intent, prior instruments discussed above (54(b) motions and correspondence to the trial court) and the appeal information form filed with this Court (discussing both sets of Defendants) (Exhibit 1, tab N) further support Appellants' position. And as the court in *McAninch* considered the procedural history of the case before it, so should this Court. The insistence of Appellees regarding taking the appeal and the negotiations between the parties cannot be ignored.

Krause. A number of Second Circuit opinions fully support Appellants' position. The most cited Second Circuit opinion on the issue of adequacy of a notice of appeal is *Krause v. Bennett*, 887 F.2d 362, 367 n.2 (2nd Cir. 1989). In *Krause*, the appellant's notice stated that appeal was being taken from "the final judgment entered in this action on the 14th day of November, 1988." *Id.* But the judgment actually being appealed was entered on March 20, 1987 (a year and a half earlier). *Id.* The only order on November 14, 1988 was the trial court's ruling on a post-trial motion. *Id.*

The Second Circuit noted that while appellant's notice of appeal was "technically inaccurate . . . it is clear that [Appellant] intends to appeal from the judgment entered in March 1987." *Id.* The Court stated, "[w]e therefore treat the notice of appeal as an appeal from that judgment." *Id.*

Krause should govern the Court's ruling on Appellees' Motion. Appellants manifested an intent to appeal based on the Rule 54 orders. The appeal from the summary judgment rulings was requested by the Appellees and the Rule 54 orders were negotiated. Given the procedural history of this case, there can be no other explanation for obtaining Rule 54(b) orders but immediate appeal.

D'Amato and Alfaro. Two subsequent cases from this Court have cited *Krause* and reached the same result. These cases also cannot be overlooked. These cases are, as discussed more fully in Appellants' original briefing, *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2nd Cir. 2001) (permitting appeal from final judgment where the only document referenced in the notice was a memorandum opinion), and *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111,

114 n.1 (2nd Cir. 2000) (permitting appeal from judgment where appeal was noticed on a post-trial motion).

c. Appellees Will Suffer No Prejudice.

As the August 28 Order does not address the issue of prejudice, rather only the issue of intent, Appellants would direct this Court to their original briefing on this issue. Exhibit 1, Response p. 12. Suffice it to say, however, the issue to be briefed on appeal regarding the Josephthal Defendants has already been briefed in full by the Appellees in the trial court and as Appellants' brief is not yet due, Appellees will have full opportunity to brief it again. The only prejudice suffered by Appellees would be that they did not get the opportunity to win on a technicality.

3. Amendment to a Notice of Appeal Is Permitted.

A number of cases address similar issues and permit amendments to a notice of appeal. In *In re Wyse*, the court noted that a misdescription in a notice of appeal does not invalidate the appeal. 340 F.2d 719, 725 (6th Cir. 1965). Rather, noting that the notice of appeal was timely, but misdescribed the order at issue, the court permitted amendment to the notice of appeal and regarded the notice to be notice of appeal from the correct judgment. *Id. See also, Preble v. Johnson*, 275 F.2d 275 (10th Cir. 1960).

c. Dismissal of the Appeal Regarding Bear Stearns Defendants was Neither Requested Nor Warranted.

The only Appellees moving for dismissal were the Josephthal Defendants and their motion's first paragraph makes it perfectly clear that they are moving for an order dismissing the appeal from the 54(b) judgment docketed by the trial court as docket number 121, which they refer to as the "Josephthal Judgment." Exhibit 1, at 1. These moving parties judicially admit the timeliness of the appeal regarding the Bear Stearns Defendants/Appellees when they say, "Plaintiffs filed only *one* timely Notice of Appeal . . . ," which is referred to by them as the notice of appeal pertaining to "the Bear Stearns Judgment." *Id.* at 5 [emphasis in original]. They conclude by requesting only "that the purported appeal of the Josephthal Judgment be dismissed." *Id.* at 10.

As no party to this appeal contended that the notice was untimely or did not constitute sufficient notice from the Bear Stearns Judgment, and no relief whatsoever was requested regarding same, the appeal regarding the Bear Stearns Defendants should not have been dismissed. Nevertheless, this Court has dismissed the appeal regarding the Bear Stearns Judgment anyway.

V. CONCLUSION

The United States Supreme Court stated, "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227 (1962). This is supported by the Federal Rules of Appellate

Procedure. Rule 3(C)(4) states, "[a]n appeal must not be dismissed because of an informality of form or title of the notice of appeal. . . . "

The law of "adequacy" of designations requires only that intent to appeal can be ascertained and no prejudice to Appellees. Both prongs of the test are met in this case. The intent was always known to Appellees and each of the writings at issue, including the Notice of Appeal, express that intent. Appellees have briefed the issue before and will be able to do so again.

For the longest time, Appellees had actual notice of Appellants' intent regarding both sets of defendants. They in fact requested that Appellants take such action. The 54(b) motions and the correspondence to the trial court expressed the intent to appeal the rulings regarding both sets of defendants.

APPELLANTS, as such, respectfully request that this Court vacate the August 28, 2002 Order, reinstate this appeal in its entirety and restore it to the calendar for argument.

Dated: Houston, Texas
September 10, 2002

Respectfully submitted,

WARE, SNOW, FOGEL & JACKSON, L.L.P.

By: _____

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DECLARATION OF SERVICE

Jeffrey Nolan Diamant, declares under penalty of perjury: On September 10, 2002, I served a copy of the foregoing instrument along with the Affidavit of Jeffrey Nolan Diamant in support thereof with exhibits thereto by causing the same to be sent by facsimile, Federal Express and/or certified mail, return receipt requested to Ed Little and Lisa A. Cahill, Esq., counsel for Appellants, at the following address and fax number: 1114 Avenue of the Americas, New York, New York 10036 (Fax No. (212) 479-6512).

Dated: Houston, Texas
September 10, 2002

Jeffrey Nolan Diamant

AFFIDAVIT OF JEFFREY NOLAN DIAMANT IN SUPPORT OF APPELLANTS ALTERNATIVE MOTION TO REINSTATE OR RECONSIDER

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Jeffrey Nolan Diamant, an attorney licensed to practice in the State of Texas, and admitted to practice *pro hac vice* in connection with the matter of *Jonathan E. S. Bekhor, et al. v. Josephthal Group, Inc., et al.*, pending in the United States District Court for the Southern District of New York, Cause Number 96-CV-4156, hereby affirms as follows under penalty of perjury:

1. I am an attorney in good standing for the Bar of the State of Texas, as well as with the State of New York in connection with my representation of the Plaintiffs as referenced herein. I have personal knowledge of all of the facts set forth herein. In that capacity, I swear and affirm the matters set forth in this Affidavit.

2. **Background of the Reasons for Submission of this Affidavit.** Appellants filed a Petition for En Banc Rehearing or in the alternative Petition for Panel Rehearing or Motion to Reinstate or Reconsider ("Petition"). Appellants believe that the matters presented in that filing are most properly matters for a Petition for Rehearing as opposed to a motion. Appellants had been informed by court personnel prior to the filing of that petition that the court personnel believed the matters to presented in Appellants' Petition were more properly matters to be considered by motion rather than a petition for rehearing. Having reached the conclusion that the matters in Appellants' Petition were more properly matters for petition for rehearing, but conscious of the court personnel's comments, the Petition was filed in a manner such that it

that it could be alternatively considered as a motion. A Motion Information Form was completed and filed therewith.

3. Today Appellants were informed by the third-party service they have enlisted to assist with the assembly and filing of documents incident to this appeal that court personnel notified them that they believe the matters presented in Appellants' Petition were matters that should be considered on motion and requested an affidavit to support such a motion. This affidavit is made pursuant to that request. Appellants still request that this Court consider their Petition En Banc, or in the alternative, by Panel, but nevertheless as a petition for rehearing. It is, of course, the Court's decision how it will consider the matters set forth in Appellants' Petition. As such, Appellants are submitting this Affidavit, but in doing so, hereby are doing such pursuant to the court's personnel's instructions without waiving any rights they may have had, do currently have, or will have in the future regarding, relating to or incidental to a timely filed petition for rehearing or this appeal generally.

4. **About this Affidavit**. This Affidavit contains information in the following sections/paragraphs in support of Appellants' request to vacate its August 28, 2002 Order and reinstate their appeal. Given the matters set forth in the preceding paragraphs, the following sections contain a nearly identical factual recitation as that set forth in Section I of Appellants' Petition (the differences are in the removal of anything that may be argument or legal discussion). Hence, if the Court has read Section I of Appellants' Petition, the need for the Court to read section/paragraph 5 through the end of this Affidavit is vitiated. The last numbered section/paragraph of this Affidavit is to reaffirm (in some cases) and establish (in the other cases) the truth and accuracy of the

documents/exhibits attached to Appellants' Petition. The exhibit references in below are to those exhibits affixed to Appellants' Petition.

5. **Facts Supporting Appellants' Request for Reinstatement of Their Appeal**. Nearly two years ago, the trial court granted summary judgment, dismissing the Josephthal Defendants (Josephthal Group, Inc., Josephthal Holdings, Inc., Josephthal Lyon & Ross, Inc., and Dan Purjes) and dismissing several claims against the Bear Stearns Defendants (Bear, Stearns and Co., Inc. and Bear Stearns Security Corp.). Exhibit 1, Tab A. Ultimately, after more than a year of dialogue, the Defendants and Plaintiffs agreed on the certification of certain issues to be appealed to this Court. This included appeal of the Josephthal dismissal. Defendants' counsel wrote to the trial court stating: "We, of course, would not oppose Rule 54 certification of an immediate appeal as to the dismissal of the Josephthal Defendants." Exhibit 1, Tab D. The trial court granted agreed Rule 54(b) certification motions.

6. Only one order was issued granting the summary judgment. Exhibit 1, Tab A. Only one judgment was provided by the trial court to the plaintiffs, **dated** March 14th 2001. Exhibit 1, Tab L. Plaintiffs timely filed a notice, which mistakenly misdescribed the subject matter of the appeal as "the judgment **entered** March 14, 2002," when in fact there were two judgments entered March 15, 2002 – one dated March 14th, 2002 and the other dated March 13, 2002. It was later discovered that the judgment provided by the trial court only applied to the Bear Stearns Defendants and another judgment (unbeknownst to Appellants) had been entered regarding the Josephthal Defendants. No notice of that judgment was ever given to Appellants. Exhibit 1, Tab L.

7. On its face the Notice of Appeal referenced only one judgment, and erroneously assumed that only one judgment existed. Appellants were informed of the existence of the second judgment in a letter from Appellees, which attempted to force Appellants into choosing only one of the judgments as the subject matter of the appeal, after the time for notice had expired. Exhibit 1, Tab O. The Letter states:

> [Your Notice of Appeal] purports to notice the appeal of a judgment (singular), despite there being two judgments on file . . .
>
> Please let us know which judgment you are purportedly appealing.

Id. Although both the trial court personnel and the personnel of this Court indicated that Appellants need do nothing, Appellants immediately filed a supplement to their Notice of Appeal out of an abundance of caution. Exhibit 1, Tab P. The supplement bore the title "Supplement to Notice of Appeal." *Id.* A clerk in the trial court "whited-out" the words "Supplement to" and hand wrote "Amended" in its stead. *Id.* at Tab Q.

8. The Josephthal Defendants moved for dismissal, suggesting that the Notice, although timely, only referenced "*one* judgment." Exhibit 1, p. 5. Despite their letter claiming that they did not know which judgment the notice referenced, they now are able to pick one. They argued that this Court lacked jurisdiction to "the extent Plaintiffs seek review of the Josephthal judgment." *Id.*

9. Appellants opposed based on longstanding case law and the Rule that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal . . . " F.R.A.P. 3(c)(4).

10. **The docket entry of this Court shows that Appellees' motion to dismiss was denied.** It reads in pertinent part:

> Order FILED DENYING motion to dismiss the appeal [2118585-1] by Appellee Josephthal Group, endorsed on motion dated 7/11/02.

Exhibit 4. The remainder of the docket entry is inconsistent with the denial of the motion, as it goes on to dismiss the entire appeal. *Id.* (containing additional error "infaired inferred"). The order dismissing the appeal tracks the latter part of the docket entry and is, needless to say, not consistent with the docket entry denying the motion to dismiss.

11. The order dismissed the entire appeal. Exhibit 3. The Order makes no distinction between the appeals of the two sets of efendants [sic] and fails to recognize that no party requested the dismissal of the Bear Stearns Defendants. *Id.* The Order cites only one case in a line of cases regarding *timeliness* of appeal notices and does not refer to the cases which discuss the descriptive *sufficiency* of a timely notice, which is the issue here. Appellants seek rehearing of this dismissal and reinstatement of the appeal as to both sets of Appellees.

12. **Exhibits**. I hereby affirm that Exhibits 1-4 attached to Appellants' Petition are true and correct copies of such documents. I further reaffirm my sworn statement in my affidavit in support of Appellants' Response to the Josephthal Defendants' Motion to Dismiss that the documents at Tabs A-Q of that affidavit, which were affixed as Exhibits A-Q thereto, are true and correct copies of such documents.

Further, Affiant sayeth not.

Jeffrey Nolan Diamant

SWORN TO AND SUBSCRIBED before me this 11th day of September, 2002, to certify which witness my hand and official seal of office.

Notary Public in and for the State of Texas

DECLARATION OF SERVICE

Jeffrey Nolan Diamant, declares under penalty of perjury: On September 12, 2002, I served a copy of the foregoing instrument by causing the same to be sent by facsimile, Federal Express and/or certified mail, return receipt requested to Ed Little and Lisa A. Cahill, Esq., counsel for Appellants, at the following address and fax number: 1114 Avenue of the Americas, New York, New York 10036 (Fax No. (212) 479-6512).

Dated: Houston, Texas
September 12, 2002

Jeffrey Nolan Diamant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JONOTHAN [sic] E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURTIES, Appellants -against- JOSEPHTHAL GROUP, INC. a corporation: JOSEPHTHAL HOLDINGS, INC., a corporation; JOSEPHTHAL LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual; BEAR, STEARNS AND CO., INC., a corporation; and BEAR STEARNS SECURITIES CORP., a corporation, Appellees	:	Docket No. 02-7401

APPELLANTS' RESPONSE TO MOTION OF DEFENDANTS/APPELLEES JOSEPHTHAL GROUP, INC., JOSEPHTHAL HOLDINGS, INC. JOSEPHTHAL, LYON & ROSS, INCORPORATED AND DAN PURJES TO DISMISS THE PURPORTED APPEAL PURSUANT TO F.R.A.P. 4

Appellants Jonathan E.S. Bekhor, International Investment Holdings, Inc. and Bishop Saxony Corp. d/b/a First Affiliated Securities respond to Appellees Josephthal Group, Inc., Josephthal Holdings, Inc., Josephthal, Lyon & Ross, Incorporated and Dan Purjes' (the "Josephthal Defendants")

Motion to Dismiss the appeal of Appellants regarding the summary judgment ruling as to the Josephthal Defendants because the intent to appeal such judgment is apparent, the Josephthal Defendants had actual notice of same, and the Joesphthal Defendants have suffered no prejudice.

I. FACTUAL BACKGROUND

This lawsuit was filed by the Plaintiffs in 1995. Plaintiffs are still awaiting a trial. The underlying facts, in brief summary, are as follows:

Plaintiffs negotiated a deal to sell First Affiliated Securities, a broker-dealer in the securities business, to the Josephthal Defendants. The Josephthal Defendants made a cash payment that is alleged to have been intended as an advance. The advance was documented with a promissory note. The promissory note was secured with collateral in the form of, among other things, First Affiliated Securities' "customer accounts."

After assurances to the contrary, it is alleged that the Josephthal Defendants wrongfully called the promissory note and improperly and unlawfully foreclosed on the collateral – the customer accounts of First Affiliated Securities. The Bear, Stearns Defendants, First Affiliated Securities' clearing firm, denied First Affiliated access to these accounts and literally transferred the accounts to the Josephthal Defendants. It is alleged that, among other wrongdoings, the Bear Stearns Defendants conspired with the Josephthal Defendants to wrongfully effect this transfer of customer accounts.

After the transfer was effected, and Plaintiff Jonathan E.S. Bekhor discovered the transfer, Mr. Bekhor flew to New York to attend a meeting with the Josephthal Defendants' key principal, Dan Purjes. It is alleged that, under physical and economic duress, Mr. Bekhor was forced to sign a release agreement. It is also alleged that the release agreement was invalid for reasons other than, but including, the duress.

II. PROCEDURAL BACKGROUND

A. THE SUMMARY JUDGMENTS AND INTENT TO APPEAL.

All Defendants moved for summary judgment. The motions were brought in separate instruments, one by the Josephthal Defendants and one by the Bear Stearns Defendants. Summary judgment was granted dismissing the Josephthal Defendants in their entirety on the grounds that they have been previously released of liability for this wrongdoing. Several of the independent claims against the Bear Stearns Defendants were also dismissed on summary judgment on legal or factual grounds other than release. Annexed Affidavit of Jeffrey Nolan Diamant in support of this Response ("Diamant Aff.") ¶ 2 and Exhibit A thereto (the court's Memorandum and Order of October 11, 2000).

Appeal from the summary judgment rulings at the time of the ruling would not be timely but for Federal Rule of Civil Procedure 54(b) certification by the trial court. Shortly after the ruling, Appellees began their push to have the summary judgment rulings regarding both sets of defendants appealed immediately. Lisa Cahill, counsel for Appellees, started this push with a letter to the trial court

requesting that the trial court force Appellants to appeal the summary judgment rulings regarding both sets of defendants immediately, rather than at the conclusion of the trial on the remaining Bear Stearns claims. Diamant Aff. ¶ 3 and Exhibit B thereto (letter of Lisa Cahill dated January 12, 2001). Appellees continued to push through another letter to the trial court shortly following Appellants' letter in response to Appellees' letter of January 12, 2001. Diamant Aff. ¶ 4 and Exhibits C and D thereto (letter of Jeffrey Nolan Diamant dated January 12, 2001 and letter of Lisa Cahill dated January 17, 2001).

On February 1, 2001, counsel in this matter attended an "in chambers" conference with the trial court and counsel for the Appellees. Diamant Aff. ¶ 5. At that conference, both court and counsel for Appellees inquired again about Plaintiffs' intent regarding appeal from the summary judgment ruling. Diamant Aff. ¶ 5. As claims remain in the underlying action against the Bear Stearns Defendants, Plaintiffs expressed their desire to only appeal the summary judgment ruling regarding the *Josephthal Defendants*. At the insistence of counsel for the Defendants, Plaintiffs agreed to appeal the summary judgment rulings for both sets of defendants. Diamant Aff. ¶ 6.

B. 54(b) CERTIFICATION.

Appellants prepared motions for 54(b) certification for both sets of defendants and submitted them to the trial court for ruling. Diamant Aff. ¶ 6 and Exhibit E thereto. The Appellants' intent to appeal the summary judgment ruling regarding both sets of defendants was known at that time, if for no other reason, because the Appellants

requested appeal from the summary judgment rulings for both sets of defendants and Appellants acquiesced.

After the submission of the 54(b) motions, Appellants waited months for the trial court to grant these agreed motions. In correspondence to the trial court on July 19, 2001, counsel for Appellants wrote the court and implored it to rule on the agreed motions. Diamant Aff. ¶ 8 and Exhibit G thereto (letter of Don Jackson and Stuart Starry dated July 19, 2001). Appellants again herein expressed their intent to appeal the summary judgment order of the trial court. *Id.* The trial court finally, on September 4, 2001, by "memo endorsement," granted the motions and requested the submission of 54(b) certification orders. Diamant Aff. ¶ 9 and Exhibit H thereto. Appellants submitted same on November 2, 2001. Diamant Aff. ¶ 9 and Exhibit I thereto.

Defendants took issue with the proposed 54(b) orders and the final versions of the 54(b) orders were *negotiated* by all parties and the result of at least 2 or 3 prior drafts. Diamant Aff. ¶ 10 and Exhibit J thereto (letter from Lisa Cahill to the trial court dated November 15, 2001); and Diamant Aff. ¶ 11 and Exhibit K thereto (various letters/facsimiles negotiating language of 54(b) orders). Suffice it to say, Appellees had substantial involvement of the preparation of the 54(b) orders.

The trial court finally signed the 54(b) orders and directed the clerk to enter judgment. The court signed a judgment for one set of defendants on March 13, 2002 and the other on March 14, 2002. The final judgments were both entered on March 15, 2002. Only one judgment was sent to Plaintiffs. Diamant Aff. ¶ 12 and Exhibit L thereto (Affirmation of Jeff Weinberger, co-counsel for Appellants).

These judgments were prepared by the court, *not* any counsel in this matter. *Id.*

C. THE NOTICE OF APPEAL.

The Notice of Appeal was filed by the Plaintiffs on April 12, 2002. Diamant Aff. ¶ 13 and Exhibit M thereto. The Notice of Appeal referenced Rule 54, listed all plaintiffs as appellants and referenced an entry date of judgment as March 14, 2002. *Id.* Seven days later, April 19, 2002, Plaintiffs filed their required pre-argument statements (including Forms C and D) with this Court and again expressed its intent to appeal the summary judgment ruling regarding both sets of defendants. Diamant Aff. ¶ 14 and Exhibit M thereto (appeal information package sent to this Court).

Counsel for Defendants, on April 30, 2002, notified Plaintiffs of its alleged confusion as to which order or judgment was being appealed and pointed out that no judgment was entered on March 14, 2002. Diamant Aff. ¶ 15 and Exhibit O thereto (letter of Lisa Cahill dated April 30, 2002). In doing so, Ms. Cahill ignored all of the following:

1. Her pleas to Appellants to take immediate appeal from the summary judgment rulings for both sets of defendants;

2. Her letters to the court requesting that the court force Appellants to appeal the summary judgment rulings for both sets of defendants;

3. Her conversations with the court and counsel for Appellants in chambers on February 1, 2001;

4. Her partner, Ed Little's conversations with the undersigned counsel;

5. Appellants' ultimate acquiescence to appeal regarding both sets of defendants;

6. Appellants' submission of two sets of 54(b) motions;

7. Appellants' correspondence to the court on July 17, 2001;

8. Appellants' submission of two 54(b) certification orders;

9. Her letters consenting to 54(b) certification for both sets of defendants;

10. Her consenting to the appeal from the summary judgment rulings regarding both sets of defendants;

11. Appellants' drafts of the 54(b) orders;

12. Her edits and responses to the proposed 54(b) orders;

13. The 54(b) orders themselves;

14. The Notice of Appeal; and

15. The appeal information packet sent to this court.

In response to Defendants' letter, counsel for Plaintiffs Jeff Weinberger went to the court and discovered that, in fact, two judgments had been entered. Diamant Aff. ¶ 12 and Exhibit L thereto (Affirmation of Jeff Weinberger). This was the first news of this to the Plaintiffs. *Id.* Counsel for the Plaintiffs contacted this Court and inquired as to whether any action was necessary. Diamant Aff. ¶ 17. Personnel from this Court indicated that the Court was

aware of Plaintiffs' intent to appeal the summary judgment ruling (the summary judgment ruling regarding both sets of defendants were included in one global Memorandum and Order, not two) and indicated that no action was necessary because the Court knew that the rulings regarding both sets of defendants were being appealed. Diamant Aff. ¶ 17.

Counsel for Plaintiffs also contacted the trial court. A clerk of the trial court also indicated that no action was necessary. Diamant Aff. ¶ 18. Nevertheless, the following day, Plaintiffs filed its "Supplement to Notice of Appeal" and attached the second of two judgments as well as referenced the existence of the two judgments. Diamant Aff. ¶ 18 and Exhibit P thereto (Supplement to Notice of Appeal). The trial court staff contacted counsel for Plaintiff and explained that the Supplement to the Notice of Appeal was, in the trial court's mind, really an amendment to the Notice of Appeal and informed Plaintiffs that he would simply "white-out" the words "Supplement to" and handwrite "Amended." Diamant Aff. ¶ 19 and Exhibit Q thereto. Contrary to Defendants unsupported assertions, this change was *not* made by Appellants. Now Appellees contend they were unaware of Plaintiffs' intent to appeal the summary judgment rulings regarding both sets of defendants and request that this Court dismiss the appeal of the summary judgment rulings regarding the Josephthal Defendants. Their motion is unfounded.

III. SUMMARY OF ARGUMENT

The Defendants are arguing an irrelevant point. They contend that Plaintiffs have failed to timely notice the appeal of the summary judgment ruling regarding the

Josephthal Defendants. To the extent there is any issue, the issue is one of adequacy, not failure. Plaintiffs' intent to appeal the summary judgment ruling regarding both sets of defendants is apparent (and, in fact, has been known to Defendants for some time now), notices of appeal are to be construed liberally, and the Defendants have suffered no prejudice.

IV. ARGUMENT

A. THE LAW REGARDING ADEQUACY OF NOTICES OF APPEAL.

1. Overview.

No one has disputed that the Notice of Appeal that has been filed in this case was filed timely. Rather, the Defendants contend that the Notice of Appeal is insufficient or inadequate to be notice of intent to appeal the trial court's ruling regarding the Josephthal Defendants.

The United States has set the tone for challenges to an appeal based on the adequacy of the notice of appeal. In *Foman v. Davis,* the Court stated distinctly that notices of appeal are entitled to a liberal construction where the intent of the appellant is apparent and the adverse party is not prejudiced. 371 U.S. 178, 181, 83 S.Ct. 227 (1962). In explaining the Court's flexible approach, the Court wrote, "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Id.*

2. Intent and Prejudice.

The Second Circuit has followed the Supreme Court's lead in its approach to issues regarding the adequacy of a notice of appeal. In determining whether the Second Circuit could, or should, hear an appeal where the Notice of Appeal referenced a different order, the court in *Krause v. Bennett* permitted the appeal based on two issues: (1) the intent to appeal the correct order was apparent; and (2) the appellee suffered no prejudice due to the inaccuracy of the Notice of Appeal. 887 F.2d 362, 367 n.2 (2nd Cir. 1989). A number of subsequent cases in this circuit have not only cited *Krause,* but applied the same rule to the same or similar determinations. *See, e.g., D'Amato v. Deutsche Bank,* 236 F.3d 78 (2nd Cir. 2001) (permitting appeal even though Notice of Appeal referenced memorandum opinion, which was inaccurate); *Alfaro v. Wal-Mart Stores, Inc.,* 210 F.3d 111, 114 n.1 (2nd Cir. 2000) (holding appeal should be permitted where Notice of Appeal referred to an order denying a post-trial motion and not final judgment because intent was apparent and appellee was not misled or prejudiced by technical defect).

Most or all other jurisdictions follow this exact analysis. The Ninth Circuit, further discussing this rule, noted that to determine whether intent and prejudice are present, the court applies a two part test: (1) whether the affected party had notice of the issue on appeal; and (2) whether the affected party had an opportunity to fully brief the issue. *Lynn v. Sheet Metal Workers' International Ass'n.,* 804 F.2d 1472, 1481 (9th Cir. 1986), *aff'd,* 488 U.S. 347, 109 S.Ct. 639 (1989). This two part test is the practical application of the intent and prejudice analysis used by each of the other jurisdictions.

3. Liberal Construction.

The Second Circuit has taken literally the Supreme Court's statement that notices of appeal are to be construed liberally. In a number of examples, the Second Circuit has actually considered documents other than notices of appeal to constitute a notice of appeal. Noting that the court may honor any document that serves as the functional equivalent of a notice of appeal, this Court, in *Haugen v. Nassau County Dept. of Social Services,* found a letter from the social services department to the court requesting an extension of the time to appeal as a notice of appeal simply because it indicated that the social services department intended to appeal. 171 F.3d 136, 138 (2nd Cir. 1999). This rule was taken a step further in *Boguslavsky v. South Richmond Securities* when the Second Circuit deemed appellant's brief on appeal sufficient to provide notice of appeal. 225 F.3d 127, 129 (2nd Cir. 2000).

B. INTENT AND PREJUDICE RULE IS SATISFIED IN THIS CASE.

1. Intent to Appeal Ruling Regarding Josephthal Defendants is Apparent.

Appellants have had actual knowledge of Appellee's intent to appeal the summary judgment ruling regarding both sets of Defendants. In fact, it was Appellees' push to effect the appeal regarding both sets of defendants that ultimately resulted in Appellants' acquiescence to same. Ms. Cahill wrote in her January 17, 2001 letter to the trial court that appeal regarding both sets of defendants should occur immediately so Plaintiffs could not "hedge their bets" and to prevent a "dual-track approach that would potentially amount to a colossal waste of judicial, court

system, and party resources." Diamant Aff. ¶ 4 and Exhibit D thereto. Ms. Cahill continued by noting that the Defendants did not oppose Rule 54 certification and, hence, consented to an "immediate appeal as to the dismissal of the Josephthal defendants." *Id.*

The in-chambers discussions with the trial court, the conversations with Ed Little and the ultimate submission of *two*, not one, 54(b) motions constitutes additional distinct evidence that the intent to appeal regarding the Josephthal Defendants was well known to Appellee. The strongest evidence of this is Ms. Cahill's own words. Ms. Cahill wrote:

> As I *already represented to you in writing, and as I have told you over the phone* (I don't know why you insist on a specific separate writing), the defendants consent to entry of judgments under Rule 54 as against the Josephthal defendants, and as against the dismissed Bear Stearns claims.

Diamant Aff. ¶ 7 and Exhibit F thereto.

To further illustrate Appellees' knowledge of Appellants' intent to appeal the rulings for both sets of defendants, this Court should consider the two submitted orders as well as the substantial negotiation of the final orders by Appellee. Considering these facts and the procedural history of this case, it is impossible for Appellees to claim that they did not know that the summary judgment rulings regarding *both* sets of defendants were being appealed.

Further, as all parties agreed to 54(b) certification, and the Notice of Appeal referred to Rule 54, intent to appeal the summary judgment rulings regarding both

defendants can certainly be inferred from the Notice of Appeal. The Notice of Appeal not only referred to Rule 54, but designated all Plaintiffs in the underlying action as parties taking the appeal.

Last, both the 54(b) motions themselves as well as correspondence from Appellants' counsel to the trial court on July 19, 2001 (imploring the trial court to rule on the agreed motions so Appellants could take their appeal) expressed Appellants' intent to appeal the summary judgment rulings for both sets of defendants. As noted by the Second Circuit, any document that functionally acts like a notice of appeal can be honored by this Court. *Haugen v. Nassau County Dept. of Social Services,* 171 F.3d 136, 138 (2nd Cir. 1999). Hence, in this case, either the 54(b) motions or the letter by counsel for Appellant on July 17, 2001 can serve as effective notice of appeal of the summary judgment rulings regarding both sets of defendants.

Simply, not only did the Appellees have actual notice of Appellants' intent to appeal the summary judgment rulings regarding both sets of defendants, but they in fact requested that Appellants take such action. And as Appellants' earlier documents (the 54(b) motions and the correspondence to the trial court) expressed their intent to appeal the summary judgment rulings regarding both sets of defendants, these instruments can be, and have been in similar circumstances, held to be sufficient and timely notice of appeal.[1] Intent to appeal the summary judgment

[1] As this Court is undoubtedly aware, instruments filed prior to the time of entry of a judgment that begins the timetable for fililng a notice of appeal are considered valid and effective as of the date of entry of the

(Continued on following page)

rulings is, therefore, apparent and any argument to dismiss the appeal should be considered waived by Appellees given their insistence and consent to take the appeal from the summary judgment rulings regarding both sets of defendants.

2. Appellee Has Suffered No Prejudice.

Appellee can not demonstrate any prejudice from the alleged technical defect in the Notice of Appeal. The issue to be briefed on appeal regarding the summary judgment ruling for the Josephthal Defendants has already been briefed in full by the Appellees. Appellees' summary judgment briefing began with the precise issue on appeal and was fully argued by them in their briefing. Much or most of the argument in front of this Court will be precisely the same issue and same points as have already been presented to the trial court. Further, the cases from this jurisdiction, and most or all other jurisdictions, address prejudice by determining whether Appellants will have or did have the opportunity to fully brief the issue or claims being appealed. Appellees' brief is not yet due. In fact, Appellants' brief is not yet due. Certainly Appellees will have the opportunity to fully brief the summary judgment ruling regarding the Josephthal Defendants and have done so already in the trial court.

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dispositive judgment. *Hodge ex rel. Skiff v. Hodge*, 269 F.3d 155 (2nd Cir. 2001).

3. Case Law Supports Appellants' Position.

(a). Krause.

A number of Second Circuit opinions fully support Appellants' position set forth in this response. The most cited Second Circuit opinion on the issue of adequacy of a notice of appeal is *Krause v. Bennett,* 887 F.2d 362, 367 n.2 (2nd Cir. 1989). In *Krause,* the Appellant's Notice of Appeal stated that appeal was being taken from "the final judgment entered in this action on the 14th day of November, 1988." *Id.* But the judgment actually being appealed was entered on March 20, 1987 (a year and a half earlier) after the jury verdict was rendered. *Id.* The only order on November 14, 1988 was the trial court's ruling on a post-trial motion. *Id.*

The Second Circuit noted that while Appellant's Notice of Appeal is "technically inaccurate . . . it is clear that [Appellant] intends to appeal from the judgment entered in March 1987." *Id.* The Court stated, "[w]e therefore treat the notice of appeal as an appeal from that judgment." *Id.*

The Court also addressed the issue of prejudice. It wrote:

> Even if the notice of appeal could only be construed as an appeal from the order entered in November 1988, that would not be fatal to our jurisdiction. Krause has responded in full to Bennett's arguments and has not been prejudiced in any way by the inaccuracy in the notice of appeal.

Id.

Krause, in and of itself, should govern the Court's ruling on Appellees' Motion. Appellants' had no knowledge of the existence of a second judgment and noticed an intent to appeal the based on the Rule 54 orders. Further, the appeal from the summary judgment rulings was requested by the Appellees and the Rule 54 orders were negotiated by them and consented to by them. And as the Appellants' brief is not yet due, Appellees will have more than sufficient opportunity to brief the Josephthal issues that they have already briefed in the trial court.

(b). D'Amato and Alfaro.

Two subsequent cases in this circuit have not only cited *Krause*, but applied the same rule to the same or similar determinations. In *D'Amato v. Deutsche Bank*, Appellant noticed an appeal from a memorandum opinion, not the final judgment. 236 F.3d 78 (2nd Cir. 2001). Appellee argued that the defect in the Notice of Appeal was jurisdictional and required dismissal of the appeal. This Court again found the intent to appeal apparent and, regarding Appellee's argument, stated that "[w]e reject this contention and will entertain this appeal." *Id.* (citing *Krause v. Bennett*, 887 F.2d 362, 367 n.2 (2nd Cir. 1989)).

In *Alfaro v. Wal-Mart Stores, Inc.*, Appellant noticed their appeal from the ruling on a post-trial motion and not the entered judgment. 210 F.3d 111, 114 n.1 (2nd Cir. 2000). This Court found the intent to appeal the judgment apparent and noted that Appellee had not been misled or prejudiced by the technical defect. *Id.* This Court stated, "we may–and do–treat Wal-Mart's notice of appeal as an appeal from the judgment." *Id.*

c. Other jurisdictions.

Most notable to this case is *Lyon v. Sheet Metal Workers' International Ass'n*, 804 F.2d 1472, 1481 (9th Cir. 1986), *aff'd*, 488 U.S. 347, 109 S.Ct. 639 (1989). In *Lyon*, the Ninth Circuit addressed the issue where two judgments were entered, all appellants notified of their intent to appeal, but only notified of their intent to appeal one of the two judgments. *Id.* This is identical to this case. Two judgments were entered, all Appellants notified Appellees of their intent to appeal, but only one judgment was referenced.

The Ninth Circuit applied the same test applied by this Court. The Ninth Circuit noted that "a mistake in designating the judgment appealed from should not bar appeal so long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake." *Id.* The court noted that the appellants briefed the issue, filed a joint brief with the issue fully discussed, and thus, appellee had notice of the issue. *Id.* As such, the court found no prejudice to appellee and heard the appeal. *Id.* No reason exists why this case should be treated any differently than *Lyon*.

The Eighth Circuit reached the same result in nearly identical circumstances. In *McKenzie v. Truckers National Bank of Kansas City*, appellees alleged that a single notice of appeal filed in two consolidated cases did not specify that appeal was being taken from the granting of a summary judgment regarding certain parties nor did it specify that appeal was being taken from an order dismissing another party. 779 F.2d 466, 467 n.2 (8th Cir. 1985), *cert. denied*, 476 U.S. 1142, 106 S.Ct. 2017 (1986). Noting the policy to construe notices of appeal liberally where intent

is apparent and no prejudice is suffered, the court found intent to appeal the summary judgment ruling apparent from the filing of a premature notice and inclusion of the order on the appeal information form. *Id.* The court found intent to appeal the order dismissing the other party apparent "given the procedural history of the case, the listing of Albis on the caption of the notice of appeal, and the inclusion of the order on the appeal information form." *Id.*

In this case, in addition to Appellee's actual knowledge of Appellant's intent, the prior instruments discussed above (54(b) motions and correspondence to the trial court), the intent to appeal the summary judgment rulings for both sets of defendants is also contained in the appeal information form filed with this Court. And as the court in *McAninch* considered the procedural history of the case before it, so should this Court. The insistence of Appellees regarding taking the appeal now, along with the negotiations between the parties on whether appeal would be taken and the 54(b) certification orders, demonstrates apparent intent and lack of prejudice.

C. APPELLEES' ARGUMENT FAILS.

1. Appellees Apply the Wrong Law.

Appellees cite this Court to a number of cases addressing failure to notice appeals and have discussed in detail the strictness of the deadlines on noticing an appeal. *Every one* but one[5] of Appellees' cases deal singularly with

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[5] *One of Appellees' cited cases, Hartford Fire Ins. v. Orient Overseas Containers Lines*, 230 F.3d 549 (2nd Cir.2000), actually holds

(Continued on following page)

the complete failure to notice an appeal. There is no question that an untimely notice without an extension of time deprives the appellate court of jurisdiction. But this is not an issue of failure. Rather, it is one, if anything, of adequacy. The cases on adequacy discussed above demonstrate definitively that the various circuits deal with this situation as if it is an adequacy issue. Further, Appellees have not contended that the Notice of Appeal in this case was itself untimely.

2. Appellees Have Ignored an Entire Body of Applicable Law.

In making their argument, and in citing the "failure" cases, Appellees fail to reference any of the body of cases discussed in this Response. In so doing, they have failed to bring to this Court's attention the body of cases applicable to this dispute, even though those cases are readily, and in fact, easily accessible. Appellees do, however, briefly note the "intent" rule discussed herein. They instruct this Court that it cannot forgive the "failure" to designate the second judgment and support that statement by cavalierly stating:

> No federal court to our knowledge has ever stretched Rule 3(c)(4) to impute, from the filing of one appeal, on one judgment, in connection with one set of defendants, an intent to appeal a different judgment, with a different docket entry number, covering a different set of claims against an entirely different set of parties.

squarely on point with Appellants' position in this Response. That case is discussed below.

APPELLEE'S MOTION at 8. In so doing, Appellees squarely ignore (or completely failed to discover) *Lynn v. Sheet Metal Workers' International Ass'n.*, 804 F.2d 1472, 1481 (9th Cir. 1986), *aff'd*, 488 U.S. 347, 109 S.Ct. 639 (1989) and *McAninch v. Traders National Bank of Kansas City*, 779 F.2d 466, 467 n.2 (8th Cir. 1985), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2917 (1986) as well as their own cited case *Hartford*, discussed below. They further ignore all the rules of liberal construction and the Second Circuit law giving effect to any document that functionally acts as a notice of appeal, which can be satisfied by both Appellants' correspondence to the court and the Rule 54 motions themselves (ignoring the Rule 54 motions ignores the nearly exclusive purpose of Rule 54(b)–to effect the appeal of claims that would otherwise not be ripe for appeal).

Additionally, Appellees state, and emphasize, that the "rule does *not* forgive failures to name the party *against whom* the appeal is being taken, as is the case here." Appellees leave that point with no citations. There is only one explanation for such–there is no such rule or requirement. Appellees' argument, thus, amounts only to the misapplication of law, the failure to acknowledge applicable law, and the underscoring of patently applicable law.

3. Appellees Fail to Note the Significance of One of Their Cited Cases.

Appellees cite *Hartford Fire Ins. v. Orient Overseas Containers Lines*, 230 F.3d 549 (2nd Cir. 2000), but largely ignore its discussion and holding. In *Hartford*, the appellants filed a timely notice of appeal identifying only one defendant to appeal. The appellants later filed another notice of appeal, this time, outside the time window. This

Court went as far as inferring intent to appeal for all defendants by looking at a parenthetical phrase and noting that all defendants were listed in the caption and found a clear intention for all defendants to appeal a judgment addressing multiple defendants. *Id.* at 554. This Court again went to great lengths to explain the liberal construction rule and to infer intent if such can be inferred.

D. AMENDMENT TO A NOTICE OF APPEAL IS PERMITTED.

A number of cases address similar issues and permit amendments to a notice of appeal. In *In re Wyse,* for example, the court noted that a misdescription in a notice of appeal does not invalidate the appeal. 340 F.2d 719, 725 (6th Cir. 1965). Rather, noting that the Notice of Appeal was timely, but misdescribed the order at issue, the court permitted amendment to the Notice of Appeal and regarded the Notice to be notice of appeal from the correct judgment. *Id.*

Another example can be found in *Preble v. Johnson,* 275 F.2d 275 (10th Cir. 1960). In *Preble,* the Notice of Appeal referenced the denial of a motion for new trial. The court permitted amendment to the Notice of Appeal to reflect intent to appeal from summary judgment rulings. *Id.* at 277.

V. CONCLUSION

Appellees' Motion should be denied. Appellees would have this Court ignore the real issue and apply non-governing law. This is simply not a case of "failure" to notice an appeal. The Appellees have known for over a

year and a half of Appellants' intent to appeal the summary judgment ruling in its entirety, that is, with respect to both sets of defendants. In fact, it was at their prodding that such became the plan of action. They cannot, now, turn a blind eye to their own conduct, their own consent to the appeal regarding both sets of defendants, their knowledge that Appellants always intended to appeal regarding the Josephthal Defendants (it was only the Bear Stearns claims that were in question for some time), their own participation in the appellate process and the numerous documents expressing Appellants' intent to appeal regarding the Josephthal Defendants, and claim that the appeal should be dismissed.

The law of "adequacy" of designations requires only that intent to appeal can be ascertained (which is judged by whether Appellees had notice of the issue to be appealed) and no prejudice to Appellees (which is judged by Appellees' opportunity to fully brief the issue to be appealed). Both prongs of the test are met in this case. The intent was always known and each of the writings at issue, including the Notice of Appeal, express that intent. Appellees have briefed the issue before and will be able to do so again approximately two and one-half months from now, after Appellants brief it.

The United States Supreme Court said it best when it said "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis,* 371 U.S. 178, 181, 83 S.Ct. 227 (1962). Delay and technicalities have been the modus operandi of Appellees since the inception of this case. This case is now in its eighth year of existence, no trial has ever been set despite repeated requests of Appellants, and

Appellees now want dismissal of half this case on an unsupportable issue argued without regard to the extensive body of law in contravention with their position. Such a result would be manifestly unjust.

Dated: Houston, Texas
July 19, 2002

Respectfully submitted,

WARE, SNOW, FOGEL & JACKSON, L.L.P.

By:_____

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DECLARATION OF SERVICE

Jeffrey Nolan Diamant, declares under penalty of perjury: On July 19, 2002, I served a copy of the foregoing instrument along with the Affidavit of Jeffrey Nolan Diamant in support thereof with exhibits thereto by causing the same to be sent by facsimile, Federal Express and/or certified mail, return receipt requested to Ed Little and Lisa A. Cahill, Esq., counsel for Appellants, at the following address and fax number: 1114 Avenue of the Americas, New York, New York 10036 (Fax No. (212) 479- 6512).

Dated: Houston, Texas
July 19, 2002

_____
Jeffrey Nolan Diamant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES,	
Appellants	
-against-	
JOSEPHTHAL GROUP, INC., a corporation; JOSEPHTHAL HOLDINGS, INC., a corporation; JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual; BEAR STERNS AND CO., INC., a corporation; and BEAR STEARNS SECURITIES CORP., a corporation,	Docket No. 02-7401
Appellees	AFFIDAVIT OF JEFFREY NOLAN DIAMANT IN SUPPORT OF APPELLANTS' RESPONSE TO MOTION OF DEFENDANTS/APPELLEES JOSEPHTHAL GROUP, INC., JOSEPHTHAL HOLDINGS, INC., JOSEPHTHAL, LYON & ROSS, INCORPORATED AND DAN PURJES TO DISMISS THE PURPORTED APPEAL PURSUANT TO F.R.A.P. 4

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Jeffrey Nolan Diamant, an attorney licensed to practice in the State of Texas, and admitted to practice *pro hac vice* in connection with the matter of *Jonathan E. S. Bekhor, et al. v. Josephthal Group, Inc., et al.*, pending in

the United States District Court for the Southern District of New York, Cause Number 96-CV-4156, hereby affirms as follows under penalty of perjury:

1. I am an attorney in good standing for the Bar of the State of Texas, as well as with the State of New York in connection with my representation of the Plaintiffs as referenced herein. I have personal knowledge of all of the facts set forth herein. In that capacity, I respectfully submit this Affidavit in support of Appellants' Response to Appellee's Motion to Dismiss the appeal regarding the Josephthal Defendants (Josephthal Group, Inc., Josephthal Holdings, Inc., Josephthal, Lyon & Ross, and Dan Purjes).

2. By Memorandum and Order dated October 11, 2000, the trial court presiding over this matter granted summary judgment for the Josephthal Defendants in their entirety and summary judgment to the Bear Stearns Defendants on several of the claims pending against them. A true and correct copy of that Memorandum and Order is attached hereto as Exhibit A.

3. On January 12, 2001, Lisa Cahill, counsel for Appellees, wrote to the Court and notified the Court of Appellants' intention to appeal the rulings regarding the summary judgment for both sets of defendants. In that correspondence, she took issue with Plaintiff's intent to appeal such after the conclusion of the trial over the remaining claims pending against the Bear Stearns Defendants and began her push to demand the immediate appeal of the court's summary judgment rulings. A true and correct copy of Ms. Cahill's letter is attached hereto as Exhibit B.

4. Immediately following receipt of Ms. Cahill's letter, the undersigned counsel responded with a letter to the court dated January 12, 2001 where Appellants indicated they had not decided whether the appeals would

be taken at the conclusion of the trial regarding the Bear Stearns claims or, if possible, immediately pursuant to Federal Rule of Civil Procedure 54(b). A true and correct copy of that correspondence is attached hereto as Exhibit C. On January 17, 2001, Ms. Cahill wrote back to the trial court presiding over this matter and again pushed for the immediate appeal of the summary judgment rulings, rather than an appeal at the conclusion of the trial against Bear Stearns. A true and correct copy of that correspondence is attached hereto as Exhibit D.

5. The trial court called a conference, which was held in chambers on February 1, 2001. At that conference, the Defendants/Appellees again pushed to have the appeal of the summary judgment rulings regarding both sets of defendants taken immediately. The court confirmed that it believed these issues were ripe for certification pursuant to Rule 54 and indicated he would sign agreed motions for such.

6. Additionally, the undersigned counsel had at least two conversations with lead counsel for the Defendants/Appellees, Ed Little. Mr. Little attempted to get the undersigned counsel to agree to take their appeals immediately. The undersigned counsel indicated Appellants' willingness to appeal the summary judgment ruling regarding the Josephthal Defendants, however, indicated that they intended to await the conclusion of the Bear Stearns trial to appeal the summary judgment rulings regarding the Bear Stearns Defendants. As such, the Josephthal Defendants had actual knowledge of the Appellants' intent to take their appeal at this time. Appellants ultimately acquiesced to take the immediate appeal of the summary judgment rulings regarding both sets of Defendants. Accordingly, on February 16, 2001, Appellants filed and served their Notices of Motion for Rule 54(b) Certification regarding the claims against both sets of Defendants, along with

their Memoranda of Law in support of those Motions. A true and correct copy of the Motions and accompanying Memoranda are attached hereto as Exhibit E.

7. To ensure accurate representation that the 54(b) Motions were agreed and consented to by all Defendants, the undersigned counsel requested a specific writing on that point from counsel for Appellees. Lisa Cahill responded to same, in writing, on February 14, 2001, consenting to the entry of judgments under Rule 54 as against both sets of Defendants. A true and correct copy of this facsimile is attached hereto as Exhibit F.

8. After months of delay, on July 19, 2001, counsel for Appellants, Don Jackson and Stuart Starry, jointly wrote to the trial court imploring the court to sign the agreed Rule 54 motions, which had been on file since February 16, 2001, and again expressed their intent to appeal the entirety of the court's summary judgment ruling. A true and correct copy of this letter is attached hereto as Exhibit G.

9. Finally, on September 4, 2001, the court granted the 54(b) certification motions and requested the submission of certification orders. A true and correct copy of the trial court's two memorandum-endorsed orders are attached hereto as Exhibit H, and both bear "Received in Chambers" stamps of February 20, 2001. On November 2, 2001, Rule 54(b) certification orders were submitted by Appellants. A true and correct copy of this submission is attached hereto as Exhibit I.

10. Taking issue with the submitted orders, on November 15, 2001, Lisa Cahill again wrote to the trial court, this time requesting corrections to both proposed certification orders, that is, one addressing the Bear Stearns claims and the other addressing the Josephthal claims. A true and correct copy of this correspondence is

attached hereto as Exhibit J. Significant to this correspondence is that the trial court made no ruling of any kind regarding the motions until December 14, 2001. This ruling requested conferences so that the parties could submit agreed orders and was done by memo endorsement to Ms. Cahill's letter of November 15, 2001.

11. Following the court's ruling, a number of revised orders were sent to Appellees, and Appellees returned a number of letters or facsimiles of handwritten changes to the orders or delineating areas to which they wanted corrections. A true and correct copy of this collection of correspondence is attached hereto as Exhibit K. As this collection of correspondence evidences, final agreed orders were submitted on March 5, 2002.

12. On or about March 18, 2002, co-counsel for Appellants, Jeff Weinberger, received by mail one Judgment dated March 14, 2002, entered March 15, 2002. The Judgment was immediately forwarded to the undersigned counsel for preparation of a Notice of Appeal. A true and correct copy of the Affidavit of Jeffrey H. Weinberger is attached hereto as Exhibit L. Apparently two judgments were prepared, one on March 13, 2002 and one on March 14, 2002 (both entered on March 15, 2002 according to the court's docket sheet. Neither judgment was prepared, reviewed or modified by counsel for Appellants.

13. On April 12, 2002, Appellants filed their Notice of Appeal, expressing their intent to appeal pursuant to Rule 54 of the Federal Rules of Civil Procedure. A true and correct copy of Appellants' Notice of Appeal is attached hereto as Exhibit M.

14. On April 19, 2002, Appellants sent to this Court the appeal information package consisting of the required

Forms C and D, the order transferring venue of this action to the United States District Court for the Southern District of New York, the Memorandum and Order containing summary judgment rulings with respect to both sets of Defendants, both 54(b) certification orders, and the only Judgment that had been received by Appellants. A true and correct copy of the appeal information package is attached hereto as Exhibit N. In the required Form C, Appellants again expressly stated their intent to appeal the summary judgment rulings regarding both sets of Defendants, along with the motion to transfer venue.

15. Curiously, on April 30, 2002, Lisa Cahill sent a letter to the undersigned counsel expressing confusion as to what was being appealed. In doing so, Lisa Cahill ignored her written correspondence to the trial court requesting the appeal with respect to both sets of defendants, her and her partner's pushes to effect the appeal with respect to both sets of defendants, Plaintiff's acquiescence to same, Plaintiff's correspondence to the trial court, both motions for Rule 54(b) Certification, both submitted orders, the extensive negotiations and revisions to the 54(b) certification orders, the Notice of Appeal, and the appeal information package. A true and correct copy of Ms. Cahill's correspondence is attached hereto as Exhibit O.

16. Upon receipt of Ms. Cahill's correspondence, the undersigned counsel immediately contacted Jeff Weinberger and requested that he go to the courthouse to see if another judgment had been entered. In fact, Mr. Weinberger discovered that there was a second judgment entered that had never been transmitted to Appellants, obtained a copy of that Judgment, and faxed it to the undersigned counsel immediately. See, Affidavit of Jeff Weinberger, attached hereto as Exhibit L, at ¶¶ 4-5.

17. Upon receipt of the second Judgment, which was unknown to Appellants, the undersigned counsel contacted this Court to determine whether they were aware that both summary judgment rulings were being appealed or whether further action needed to be taken. A staff attorney or staff member of this Court notified, on that telephone call, the undersigned counsel that they were aware that the entire summary judgment ruling was being appealed and that no action was necessary.

18. After talking to this Court, the undersigned counsel also called the trial court to inform them of the same facts and inquire whether they needed anything additional. The trial court staff also indicated that no additional documentation was necessary. Nevertheless, Appellants filed a Supplement to the Notice of Appeal, which was done purely to avoid an unnecessary argument such as that which the Appellees have created through their Motion, to which this Response and Affirmation are being made. A true and correct copy of the Supplement to Notice of Appeal is attached hereto as Exhibit P. The Supplement to Notice of Appeal was sent to the District Court in precisely the manner and content that is displayed in Exhibit P.

19. Upon receipt of the Supplement to Notice of Appeal, staff of the trial court contacted directly, and at their own volition, the undersigned counsel to inform them that they had received the Supplement to Notice of Appeal. This gentleman expressed that he did not believe that "supplement" was the correct word and that he viewed it as an amendment, rather than a supplement, and as such, indicated that he would "white-out" the words "supplement to" and handwrite in "amended." A copy of the Supplement to Notice of Appeal, as modified by the trial court, is attached hereto as Exhibit Q. After its submission as the Supplement

to Notice of Appeal, that is presented in Exhibit P, *no* modification was made by Appellants.

20. It is also important to note that appeal from the rulings of both summary judgments was only being done in acquiescence to the Defendants/Appellees' request. Through their continual prodding, Appellants acquiesced primarily due to their belief that they would not receive a trial setting any time in the near future and, in fact, they have not.

Further, Affiant sayeth not.

_____
Jeffrey Nolan Diamant

SWORN TO AND SUBSCRIBED before me this ___ day of July, 2002, to certify which witness my hand and official seal of office.

_____
Notary Public in and for the
State of Texas

ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER, L.L.P.

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January 12, 2001 COPY

By Hand Delivery

The Honorable Lawrence M. McKenna
United States District Judge
Southern District of New York
500 Pearl Street, Room 1640
New York, NY 10007-1312

Re: Bekhor, et al. v. Josephthal Group, et al.,
96 Civ. 4156 (LMM)

Dear Judge McKenna:

We represent both the Josephthal defendants and the Bear Stearns defendants in the above-referenced action. As Your Honor will recall, summary judgment was granted in favor of the Josephthal defendants by Memorandum and Order dated October 11, 2000. The joint pretrial order for the remaining claims is currently due Monday, January 29, 2001. In connection with this deadline, I recently received a phone call from plaintiffs' counsel, Jeff Diamant, in which he informed me that, barring a global settlement, plaintiffs intend both to appeal this Court's order dismissing the claims against the Josephthal defendants and, at the same time, to proceed with a trial of their remaining claims against the Bear Stearns defendants.

In view of plaintiffs' express intentions, we write the Court now to object to this dual-track approach as a waste of judicial and party resources. Proceeding with the pretrial order while a major component of the case is on appeal raises the distinct possibility not only that an entirely new pretrial order would have to be prepared to reflect the Court of Appeals' decision on remand, if any, but even worse of having to halt a trial mid-stream in order to fold any revived claims back into the case. Accordingly, we respectfully request as an alternative that the January 29 deadline for submission of the pretrial order be lifted and held in abeyance until plaintiffs' appeals have run their course. Should plaintiffs' counsel waive their appeal rights until after trial, we of course would proceed with the pretrial order immediately.

We thank the Court in advance for its consideration, and remain available at Your Honor's convenience to discuss the matter further.

Respectfully submitted,

/s/ Lisa A. Cahill
Lisa A. Cahill

cc: Stuart Starry, Esq. (via facsimile)
Jeffrey Diamant, Esq. (")
Don Jackson, Esq. (")
Jeffrey Weinberger, Esq. (")
Edward J.M. Little, Esq. (by hand)

Copy

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January 12, 2001

Honorable Lawrence M. McKenna ***Via Federal Express***
Judge, United States District Court
United States Courthouse
500 Pearl Street, Room 1640
New York, New York 10007-1312

Re: Docket No. 96-CV- 4156; Jonathan Bekhor, et al. vs. Josephthal Group, et al.; In the United States District Court for the Southern District of New York

Dear Judge McKenna:

This letter is in response to the Defendants' correspondence to the Court of January 12, 2001. Plaintiffs would like to clarify their position taken on appellate issues in the telephone conversation between counsel. Plaintiffs, in that conversation, did inform the Defendants of their intent to appeal this Court's summary judgment decisions. In that conversation, the Plaintiffs did not, however, indicate that they had decided whether they intended to appeal this Court's decisions at the conclusion of the trial against Bear Stearns or whether they intended to seek certification of various claims for appeal pursuant to Federal Rule of Civil Prcoedure 54. The Plaintiffs are not yet in a position to make any such decisions.

As Plaintiffs are currently attempting to make such decisions, it may be in the litigants' and the Court's best interest to have a conference regarding the Court's schedule and the availablity of an early trial setting on the remaining claims. If the Court's schedule would permit a trial between March and May of this year, then the Plaintiffs are likely to delay any appeal of this Court's rulings regarding the summary judgments until the conclusion of the trial.

If the Plaintiffs make the decision to seek Rule 54 certification of this Court's summary judgment decisions, the Defendants' letter makes clear that they are unopposed to such certification. In either event, the Plaintiffs are prepared for trial and would like the opportunity to try this approximately six-year-old case. As such, abatement of the remaining claims against Bear Stearns is unnecessary, should the Plaintiffs move for Rule 54 certification and should such certification be granted by this Court.

Therefore, Plaintiffs respectfully request that this Court grant a conference at its earliest possible convenience to discuss the availability of a prompt trial setting.

Respectfully submitted,

/s/ Jeffrey Nolan Diamant
Jeffrey Nolan Diamant

JDJ:lpc

cc: Mr. Ed Little **Via Fax# (212) 479-6512**
Ms. Lisa Cahill
Zuckerman, Spaeder, Goldstein,
Taylor & Kolker
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New York, New York 10036

cc: Honorable Ronald L. Ellis **Via Federal Express**
United States Magistrate Judge
Southern District of New York
United States Courthouse, Room 1970
500 Pearl Street
New York, New York 10007-1312

cc: Mr. Stuart Starry **Via Fax# (713) 973-7676**

cc: Mr. Jeffrey Weinberger **Via Fax# (212) 965-3735**

ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER, L.L.P.

1114 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10036
(212) 479-6500

Lisa A. Cahill
212-479-8506
lcahill@zuckerman.com

Telecopier
212-479-6512

January 17, 2001

By Hand Delivery

The Honorable Lawrence M. McKenna
United States District Judge
Southern District of New York
500 Pearl Street, Room 1640
New York, NY 10007-1312

Re: Bekhor, et al. v. Josephthal Group, et al.,
96 Civ. 4156 (LMM) (RLE)

Dear Judge McKenna:

We represent the Josephthal and Bear Stearns defendants in this action and write in response to Jeffrey Diamant's letter to the Court of January 12, 2001 (we attach a copy for the Court's convenience, together with a copy of our initial letter to the Court, to which Mr. Diamant was responding).

Although we disagree with certain statements in Mr. Diamant's letter,[1] this response focuses on the two central

[1] My notes of our phone call reflect that Mr. Diamant indicated the plaintiffs' present intention to seek leave to appeal the Josephthal portion of the Court's decision; my notes do not reflect any statement of uncertainty regarding the timing of that appeal. Our letter also

(Continued on following page)

issues now before the Court – the timing of the trial, and whether plaintiffs should be allowed two opportunities to try the case, once against Bear Stearns, and once again against the Josephthal defendants in the event some portion of the Court's decision dismissing those defendants is reversed on appeal. As to the first issue, Mr. Diamant's letter indicates plaintiffs' preference for a trial in the March through May 2001 period. While we would like to accommodate the Court and counsel, it would be impossible for us to try the case during that period inasmuch as my partner, Edward J.M. Little, who is integrally involved with the case and lead trial counsel, is scheduled to start trial on April 16, 2001 before Judge Pauley. That multi-defendant RICO conspiracy case, *United States v. Lino, et al.*, 00 Cr. 632, is expected to take at least two months, and will also understandably consume Mr. Little in trial preparation over the two months prior to April 16.

As for the second point, defendants disagree with plaintiffs' proposal that the Bear Stearns' portion of the case be segregated out for trial first, with that trial possibly followed by an appeal of the Josephthal defendants' dismissal, and possibly a second trial in the event of a reversal. Plaintiffs should not be allowed to hedge their bets in this fashion. Although recognizing that they have some leeway in this decision, we respectfully urge on this Court and our adversaries that this dual-track approach would potentially amount to a colossal waste of judicial, court system, and party resources. The case should be tried once. If plaintiffs believe any Josephthal defendants

---

contained no statement of the defendants' position on a Rule 54 certification.

are properly parties in the case, they should pursue appellate measures to weave them back into the case now (provided that is, that this Court certifies the specified issues as appropriate for appeal), with the Bear Stearns' portion of the case stayed in the interim. We, of course, would not oppose Rule 54 certification of an immediate appeal as to the dismissal of the Josephthal defendants. If the plaintiffs are serious about pursuing that appeal, they should do so now. It's the only thing that makes sense.

Finally, we note that Mr. Diamant's letter makes no mention of the request in our letter that the January 29, 2001 pretrial order obligations be held in abeyance. In view of this latest exchange of correspondence, we respectfully request that that deadline be lifted until any conference scheduled by the Court, or until other further direction from the Court.

We thank the Court for its consideration of the above points.

Respectfully submitted,

/s/ Lisa A. Cahill
Lisa A. Cahill

Enc.

cc: Stuart Starry, Esq. (via facsimile)
Jeffrey Diamant, Esq. (")
Don Jackson, Esq. (")
Jeffrey Weinberger, Esq. (")
Edward J.M. Little, Esq. (by hand)

ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER, L.L.P.

1114 Avenue of the Americas
New York, New York 10036

Tel: 212-479-6500 **Fax: 212-479-6512**

FAX MESSAGE

Date: February 14, 2001

To: Jeff Diamant
Fax #: (713) 659-6262

From: Lisa Cahill
Direct Dial: 479-6506 # of pages, including cover sheet: 01

Re: Bekhor

Dear Jeff:

As I *already represented to you in writing, and as a I have told you over the phone* (I don't know why you insist on a specific separate writing), the defendants consent to entry of judgments under Rule 54 as against the Josephthal defendants, and as against the dismissed Bear Stearns claims.

/s/ Lisa

THIS MESSAGE MAY CONTAIN CONFIDENTIAL OR PRIVILEGED INFORMATION. IF YOU ARE NOT THE INTENDED RECIPIENT, PLEASE NOTIFY US IMMEDIATELY.

WARE, SNOW, FOGEL & JACKSON
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW

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TEXAS 77002-2548

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July 19, 2001

The Hon. Lawrence M. McKenna
United States District Judge
United States Courthouse
500 Pearl Street
Chambers – Room 1640
New York, New York 10007

Via Federal Express

Re: Case No. 96 CV 4156 (LMM); *Bekhor, et al. v. Josephthal Group, Bear Stearns Group, et al.*

Dear Judge McKenna:

We represent plaintiffs in the referenced action. For the reasons set forth below, we are compelled to bring to the court's attention our clients growing concern with the delays in this case.

More than four months have passed since submission of our motion for Rule 54(b) certfication, to which the defendants had stipulated. That motion remains pending. It was made at the Court's suggestion at our February 1 status conference, to expedite plaintiffs' appeal so that any claims potentially reinstated might be heard with our remaining claims, when tried. As of now, however, plaintiffs remain trapped in a procedural quandary in which a trial of their remaining claims is indefinitely forestalled to await an appeal that is not even commenced.

We realize that this district is recognized to be among the country's most crowded and that some delays are inevitable. We ask the Court, however, to consider the history of this case and whether it is time for Mr. and Mrs. Bekhor to at long last receive their day in court. Venue was transferred here in April 1996, discovery closed in September 1999, and a pre-trial Order was timely submitted this past January by the Plaintiffs even though the defendants refused to comply. Thirteen months ago we applied for a trial preference by reason of the rapidly diminishing life expectancy of Mrs. Jill Bekhor, a material witness and shareholder of both corporate plaintiffs.

Plaintiffs are resigned to having to pursue their appellate rights on the Court's ruling on defendants' summary judgement motion last October. However, the appeal could have been fully briefed by now if our uncontested Rule 54 motion had been granted when submitted. Your Honor also indicated as that conference that we would be contacted "in April" regarding a trial date on plaintiffs' remaining claims, for sometime between this August and October.

We have not undertaken lightly the decision to write this letter, and we have no wish to incur the displaesure of the Court. We do, however, believe we are bound by a duty to our clients to respectfully implore Your Honor to put the situation right, and not only certify plaintiffs' appeal, but grant them their long awaited day in court.

We thank the Court in advance for its attention.

Respectfully submitted,

WARE, SNOW, FOGEL & JACKSON, L.L.P.

By: /s/ Don Jackson
Don Jackson

STARRY & ASSOCIATES

By: /s/ Stuart J. Starry
Stuart J. Starry

JDJ:lpc
Bekj0001

cc: Mr. Ed Little *Via Federal Express*
Ms. Lisa A. Cahill
Zuckerman, Spaeder, Goldstein,
Taylor & Kolker, L.L.P.
1114 Avenue of the Americas;
Suite 1700
New York, New York 10036

cc: Mr. Jeffrey Weinberger *Via Fax# (212) 965-3735*

MEMO ENDORSED

WARE, SNOW, FOGEL & JACKSON
Plaintiff's co-counsel, *pro hac vice*

Texico Heritage Plaza
111 Bagby – 49th Floor
Houston, Texas 77002
(713) 659-6400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC., and BISHOP SAXONY CORP., d/b/a FIRST AFFILIATED SECURITIES, Plaintiffs, -against- JOSHPHTHAL GROUP, INC., JOSEPHTHAL HOLDINGS, INC., JOSHPHTHAL LYON & ROSS, INCORPORATED, DAN PURJES, BEAR STEARNS AND CO., INC., and BEAR STEARNS SECURITIES, CORP., Defendants.	RECEIVED IN CHAMBERS FEB 20 2001 LAWRENCE M. McKENNA USDJ SDNY 96 Civ. 4156 (LJM) McKenna, J. **NOTICE OF MOTION FOR RULE 54(b) CERTIFICATION REGARDING PLAINTIFFS' CLAIMS AGAINST THE BEAR STEARNS DEFENDANTS FOR CONSPIRACY, BREACH OF FIDUCIARY DUTY, PRIMA FACIE TORT, AND INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS** Granted. [Submit order. So ordered.

) /s/ Lawrence M.
) McKenna, USDJ
9/4/01]

PLEASE TAKE NOTICE, that upon the annexed Memorandum of Law in Support of the Plaintiffs' Motion for Rule 54(b) Certification Regarding Plaintiffs' Claims against the Bear Stearns Defendants (Bear, Stearns & Company, Inc. and Bear Stearns Securities Corp.) for Conspiracy, Prima Facie Tort, Breach of Fiduciary Duty and Intentional Interference with Business Relations submitted herewith, and upon all prior proceedings had herein, Plaintiffs Jonathan E.S. Bekhor, International Investment Holdings, Inc. and Bishop Saxony Corp. d/b/a First Affiliated Securities will move this Court, before the Hon. Lawrence M. McKenna, United States District Judge, at the Courthouse, 500 Pearl Street, New York, New York, Courtroom 15-D, on a date to be scheduled by the Court following the briefing of this application, for an Order, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure entering final judgment on the Plaintiffs' Claims Against the Bear Stearns Defendants for Conspiracy. Prima Facie Tort, Breach of Fiduciary Duty and Intentional Interference with Business Relations together with such other and further relief as to the Court shall seem just and proper. ***The relief requested in this Motion is consented to by Defendants Dan Purjes, Josephthal, Lyon & Ross, Josephthal Group, and Josephthal Holdings (collectively the "Josephthal Defendants"), together, with Defendants Bear Stearns and Co., Inc. and Bear Stearns Securities Corp. (collectively referred to as the "Bear Stearns Defendants").***

Dated Houston, Texas
February 16, 2001

WARE, SNOW, FOGEL & JACKSON

Co-counsel for plaintiffs

By: /s/ Jeffrey Nolan Diamant
JEFFREY NOLAN DIAMANT, ESQ.
(JND-8807)

DECLARATION OF SERVICE

Jeff Diamant, declares under penalty of perjury: that I am over 18 years of age, duly admitted to practice *pro hac vice* before the Bar of this Court, and not a party to this action. On February 16, 2001, I served a copy of Notice of Motion for Rule 54(b) Certification Regarding Plaintiffs' Remedy against the Bear Stearns Defendants for conspiracy by causing the same to be sent by facsimile and/or certified mail, return receipt requested to Lisa A. Cahill, Esq., counsel for defendants, at the following address and fax number: 1114 Avenue of the Americas, New York, New York 10036 (Fax No. (212) 479-6512).

Dated: Houston, Texas
February 16, 2001

/s/ Jeff Diamant
Jeff Diamant (JND – 8897)

WARE, SNOW, FOGEL & JACKSON
Plaintiff's co-counsel, *pro hac vice*

Texico Heritage Plaza
111 Bagby – 49th Floor
Houston, Texas 77002
(713) 659-6400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC., and BISHOP SAXONY CORP., d/b/a FIRST AFFILIATED SECURITIES, Plaintiffs, -against- JOSHPHTHAL GROUP, INC., JOSEPHTHAL HOLDINGS, INC., JOSHPHTHAL LYON & ROSS, INCORPORATED, DAN PURJES, BEAR STEARNS AND CO., INC., and BEAR STEARNS SECURITIES, CORP., Defendants.	[RECEIVED IN CHAMBERS FEB 20 2001 LAWRENCE M. McKENNA USDJ SDNY] 96 Civ. 4156 (LJM) McKenna, J. **NOTICE OF MOTION FOR RULE 54(b) CERTIFICATION REGARDING PLAINTIFFS' CLAIMS AGAINST THE JOSEPHTHAL DEFENDANTS** [Granted. Submit proposed order. So ordered. /s/ Lawrence M. McKenna, USDJ 9/4/01]

PLEASE TAKE NOTICE, that upon the annexed Memorandum of Law in Support of the Plaintiffs' Motion for Rule 54(b) Certification Regarding Plaintiffs' Claims against the Josephthal Defendants (Josephthal Holdings,

Inc., Josephthal Group, Inc., Josephthal, Lyon & Ross, Incorporated and Dan Purjes) submitted herewith, and upon all prior proceedings had herein, plaintiffs Jonathan E.S. Bekhor, International Investment Holdings, Inc. and Bishop Saxony Corp. d/b/a First Affiliated Securities, will move this Court, before the Hon. Lawrence M. McKenna, Untied States District Judge, at the Courthouse, 500 Pearl Street, New York, New York, Courtroom 15-D, on a date to be scheduled by the Court following the briefing of this application, for an Order, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure entering final judgment on the Plaintiffs' Claims Against the Josephthal Defendants together with such other and further relief as to the Court shall seem just and proper. ***The relief requested in this Motion is consented to by Defendants Dan Purjes, Josephthal, Lyon & Ross, Josephthal Group, and Josephthal Holdings (collectively the "Josephthal Defendants"), together, with Defendants Bear Stearns and Co., Inc. and Bear Stearns Securities Corp. (collectively referred to as the "Bear Stearns Defendants").***

Dated: Houston, Texas
February 16, 2001

WARE, SNOW, FOGEL & JACKSON

Co-counsel for plaintiffs

By: /s/ Jeffrey Nolan Diamant
JEFFREY NOLAN DIAMANT, ESQ.
(JND-8897)

DECLARATION OF SERVICE

Jeff Diamant, declares under penalty of perjury: that I am over 18 years of age, duly admitted to practice *pro hac vice* before the Bar of this Court, and not a party to this action. On February 16, 2001, I served a copy of Notice of Motion for Rule 54(b) Certification Regarding Plaintiffs' Claims against the Josephthal Defendants by causing the same to be sent by facsimile and/or certified mail, return receipt requested to Lisa A. Cahill, Esq., counsel for defendants, at the following address and fax number: 1114 Avenue of the Americas, New York, New York 10036 (Fax No. (212) 479-6512).

Dated: Houston, Texas
February 16, 2001

/s/ Jeff Diamant
Jeff Diamant (JND – 8897)

MEMO ENDORSED

ZUCKERMAN SPAEDER LLP

ATTORNEYS AT LAW

1114 AVENUE OF THE AMERICA
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212-479-6512

November 15, 2001

By Hand Delivery

The Honorable Lawrence M. McKenna
United States District Judge
Southern District of New York
500 Pearl Street Room 1640
New York, NY 10007-1312

Re: Bekhor, et al. v. Josephthal Group, et al, 96 Civ. 4156 (LMM)(RLE)

[RECEIVED
IN CHAMBERS
FEB 20 2001
LAWRENCE M. McKENNA USDJ SDNY]

Dear Judge McKenna:

We represent the defendants in the above-referenced action. We write to offer the following comments on the proposed certification orders (one addressing the Bear Stearns claims, the other addressing the Josephthal claims) recently submitted to Your Honor by

plaintiff Jonathan Bekhor's attorneys (copies are attached for Your Honor's convenience):

1. With all due respect to our adversaries, the first sentence in the first full paragraph on page 2 of each proposed order does not make any sense. Words appear to be missing. We suggest that our adversaries send a clarifying letter to the Court;

2. The last line in that same paragraph ("The only claims left before the court not subject to a final disposition are Plaintiffs' claims against Defendant Bear Stearns for unjust enrichment, wrongful calling of a promissory note, and conversion.") is inaccurate in two respects. Still before the Court is the Josephthal defendants' breach of contract counterclaim, which survived the plaintiffs' motion for summary judgment. Also, "wrongful calling of a promissory note" mischaracterizes plaintiffs' claim. The claim is for breach of contract; and

3. An apostrophe is necessary following the word "Plaintiffs" in the third line of the first paragraph of section II on page 2 of the Josephthal proposed order.

We regret that we were not given an opportunity to point out these errors prior to submission of the proposed orders to the Court but our adversaries failed to circulate drafts to us in advance of filing, making it impossible for us to do so.

Respectfully submitted,
/s/ Lisa A. Cahill
Lisa A Cahill

Enc.

cc: Stuart Starry, Esq. (via facsimile)
Jeffrey Diamant, Esq. (")
Don Jackson, Esq. (")
Jeffrey Weinberger, Esq. (")
Edward J.M. Little, Esq. (by hand)
Kevin F. Clines, Esq. (")

[Counsel for plaintiffs is to submit revised certification orders taking into account what is said in this letter. The Court suggests that counsel for both sides review the orders prior to submission. So ordered.

/s/ Lawrence M. McKenna
USDJ 12/14/01]

WARE, SNOW, FOGEL & JACKSON
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW

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January 7, 2002

Ms. Lisa Cahill
Zuckerman, Spaeder,
Goldstein, Taylor & Kolker
1114 Avenue of the Americas,
17th Floor
New York, New York 10036

Via Fax# (212) 479-6512

Re: Docket No. 96-CV-4156; *Jonathan Bekhor vs. Josephthal Group, et al*; In the United States District Court for the Southern District of New York.

Dear Lisa:

I have enclosed revised certification orders reflecting the changes you requested in your correspondence to the court dated November 15, 2001. Please send me written confirmation approving the changes and I will resubmit them.

Very truly yours,

/s/ Jeffrey Nolan Diamant
Jeffrey Nolan Diamant

cc: Jeff Weinberger
Stuart Starry

ZUCKERMAN SPAEDER LLP
1114 Avenue of the Americas
New York, NY 10036
Telephone: (212) 479-6500
Fax: (212) 479-6512

FACSIMILE TRANSMISSION
COVER SHEET

To:	Jeff Diamant	Fax No: (713) 659-6262
cc:	Stuart Starry	Fax No: (713) 863-0751
	Jeff Weinberger	(212) 965-9305
From:	Lisa A. Cahill	
Date:	January 10, 2002	
Re:	Bekhor Orders	

Number of Pages (including cover sheet): 7

If you experience any problems receiving this transmission, please call Paula Mejia at (212) 479-6500.

Please let me see the next, corrected, version of the attached.

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UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JONATHAN E. S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES,	
Plaintiffs,	
v.	
JOSEPHTHAL GROUP, INC., a corporation; JOSEPHTHAL HOLDINGS, INC., a corporation; JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual, BEAR STERNS AND CO., INC., a corporation; and BEAR STEARNS SECURITIES CORP., a corporation,	
Defendants.	

CASE NO. 96-CV-4156

CERTIFICATION ORDER REGARDING PLAINTIFFS' CLAIMS AGAINST BEAR, STEARNS AND CO., INC., a corporation; and BEAR, STEARNS SECURITIES CORP., a corporation, PURSUANT TO FED R. CIV. P. 54(b)

McKenna, D.J.:

I. Background Facts

This litigation involves Plaintiffs, Jonathan E.S. Bekhor, International Investment Holdings, and Bishop Saxony Corporation, doing business as First Affiliated Securities (collectively "Plaintiffs"), against Josephthal Group, Inc., Josephthal Holdings, Inc., Josephthal, Lyon & Ross, Inc., Dan Purjes (collectively "Josephthal"), Bear Stearns and Co., Inc., and Bear Stearns Securities Corp., (collectively "Bear Stearns") (Josephthal and Bear Stearns are collectively referred to as "Defendants").

The parties submitted extensive summary judgment briefing and motions for summary judgment dismissal and/or partial summary judgment were submitted by Plaintiffs. [This sentence still makes no sense. /s/ LC] Josephthals' summary judgment motion was granted in its entirety. Defendant Bear Stearns' motion for summary judgment was granted as to Plaintiffs' claims for breach of fiduciary duty, prima facie tort, conspiracy and intentional interference with business relations. The only claims left before the court not subject to a final disposition are Plaintiffs' claims against Defendant Bear Stearns for unjust enrichment, breach of contract, and conversion, as well as the Josephthal Defendants' counterclaim for breach of contract.

Application was made for certification of this Court's rulings regarding the various summary judgment motions pursuant to Federal Rule of Civil Procedure 54(b). The Court finds that such application should be GRANTED.

II. Application of Federal Rules of Civil Procedure 54(b)

The court's summary judgment ruling on conspiracy, breach of fiduciary duty, prima facie tort, and intentional interference with business relations in favor of the Bear Stearns Defendants is final. The court's ruling ended the litigation on the merits for these claims.

There is no just reason for delay of the appeal of these claims. Plaintiffs' claims for conspiracy, breach of fiduciary duty, prima facie tort, and intentional interference with business relations against the Bear Stearns Defendants are sufficiently separable from and unrelated to the remaining claims. That is, the adjudicated and non-adjudicated claims left before the Court are separate and independent from each other. The remaining alleged liability of the Bear Stearns Defendants exists independently from the conspiracy, breach of fiduciary duty, prima facie tort, and intentional interference with business relations allegations.

* * *

Corp. (collectively "Bear Stearns") (Josephthal and Bear Stearns are collectively referred to as "Defendants").

The parties submitted extensive summary judgment briefing and motions for summary judgment dismissal and/or partial summary judgment were submitted by Plaintiffs. [This still makes no sense /s/ LC] Josephthals' summary judgment motion was granted in its entirety. Defendant Bear Stearns' motion for summary judgment was granted as to Plaintiffs' claims for breach of fiduciary duty, prima facie tort, conspiracy and intentional interference with business relations. The only claims left before

the court not subject to a final disposition are Plaintiffs' claims against Defendant Bear Stearns for unjust enrichment, breach of contract, and conversion, as well as the Josephthal Defendants' counterclaim for breach of contract.

Application was made for certification of this Court's rulings regarding the various summary judgment motions pursuant to Federal Rule of Civil Procedure 54(b). The Court finds that such application should be GRANTED.

II. Application of Federal Rule of Civil Procedure 54(b).

This Court's summary judgment ruling with respect to Josephthal's motion ends the pending litigation brought by Plaintiffs against the Josephthal Defendants as the Court's ruling grants summary judgment as to all of Plaintiffs' actions against Josephthal. Therefore, the court's granting of summary judgment in favor of the Josephthal Defendants is final.

This Court finds that there is no just reason for delaying appeal. There are no remaining claims pending against Josephthal Defendants. Any liability arising from the remaining alleged wrongful acts by the Bear Stearns Defendants is independent. These liability issues are distinct and separate and plaintiffs should not be forced to await their determination. Further, the issues pending as to the remaining defendants will not be affected by the determination of any of the claims that Plaintiffs brought against Josephthal.

Additionally, this case has been pending for over 6 years. Discovery has been closed for over a year and all

dispositive briefing has been completed. Plaintiffs' Motion for Rule 54(b) Certification Regarding Plaintiffs' Claims Against the Josephthal Defendants was submitted without objection from any of the Defendants. Therefore, the Josephthal Defendants will not be prejudiced by this termination.

III. Order

Upon this Court's determination that there is no just reason for delay, the Court hereby certifies that all of the Plaintiffs' claims against the Josephthal Defendants are ready for appeal. The Court has, or hereby does, direct entry of a final judgment on all of the Plaintiffs' claims against the Josephthal Defendants.

SO ORDERED.

DATED: _____
NEW YORK, NEW YORK

_____
LAWRENCE M. MCKENNA
U.S.D.J.

WARE, SNOW, FOGEL & JACKSON
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW

TEXACO HERITAGE PLAZA,
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January 14, 2002

Ms. Lisa Cahill
Zuckerman, Spaeder,
Goldstein, Taylor & Kolker
1114 Avenue of the Americas,
17th Floor
New York, New York 10036

Via Fax# (212) 479-6512

Re: Docket No. 96-CV-4156; *Jonathan Bekhor vs. Josephthal Group, et al*; In the United States District Court for the Southern District of New York.

Dear Lisa:

As this should be the last version because it incorporates your latest set of changes, please let this version supplant the penultimate version sent to you a few days ago. Please send me written confirmation approving the changes and I will resubmit them to the Court.

Very truly yours,

/s/ Jeffrey Nolan Diamant
Jeffrey Nolan Diamant

cc: Jeff Weinberger
Stuart Starry

ZUCKERMAN SPAEDER LLP
1114 Avenue of the Americas
New York, NY 10036
Telephone: (212) 479-6500
Fax: (212) 479-6512

FACSIMILE TRANSMISSION COVER SHEET

To: Jeff Diamant Fax No: (713) 659-6262

From: Lisa A. Cahill

Date: January 16, 2002

Re: Bekhor Rule 54 Order

Number of Pages (including cover sheet): 1

If you experience any problems receiving this transmission, please call Paula Mejia at (212) 479-6500.

Jeff:

I reviewed the new drafts. One final correction – on the third line of the first full paragraph on the second page, it should be "Josephthal's summary judgment motion," not "Josephthals' summary judgment motion. I don't need to see the next version. Just go ahead and submit it to the Court.

/s/ Lisa

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WARE, SNOW, FOGEL & JACKSON
A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW

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March 5, 2000

The Hon. Lawrence M. McKenna
United States District Judge
United States Courthouse
500 Pearl Street
Chambers – Room 1640
New York, New York 10007

Via Federal Express

Re: Case No. 96 CV 4156 (LMM); *Bekhor, et al. v. Josephthal Group, Bear Stearns Group, et al.*

Dear Judge McKenna:

I have enclosed two proposed orders for your consideration. They have been agreed upon by both parties pursuant to the letter from Ms. Cahill also attached.

We thank the Court in advance for its attention.

Respectfully submitted,

WARE, SNOW, FOGEL & JACKSON, L.L.P.

By: /s/ Don Jackson
Don Jackson

JDJ:sec
Enclosures

cc: Mr. Ed Little
Ms. Lisa A. Cahill
Zuckerman, Spaeder, Goldstein, Taylor & Kolker, L.L.P.
1114 Avenue of the Americas; Suite 1700
New York, New York 10036

Mr. Jeffrey Weinberger ***Via Fax# (212) 965-3735***

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES, Plaintiffs/Appellants - against - JOSEPHTHAL GROUP, INC., a corporation, JOSEPHTHAL HOLDINGS, INC., a corporation, JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation, DAN PURJES, an individual, BEAR STEARNS & CO., INC., a corporation, and BEAR STEARS [sic] SECURITIES CORP., a corporation, Defendants/Appellees.	Docket No. 02-7491 **AFFIRMATION OF APPELLANTS' LOCAL COUNSEL IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL**

JEFFREY H. WEINBERGER, an attorney licensed to practice in the State of New York, hereby affirms as follows under penalty of perjury:

1. I am an attorney in good standing before the Bar of the State of New York, and authorized to practice in the Southern and Eastern Districts of New York and before this Court. I am plaintiffs/appellants' local counsel in this

action, and have personal knowledge of the following facts. In that capacity, I respectfully submit this Affirmation in opposition to the motion by defendants/appellees' to dismiss plaintiffs' appeal from one of two judgments entered below (McKenna, U.S.D.J.).

Nonreceipt of Josephthal Judgment:

2. On or about March 18, 2002, I received in the mail a copy of a judgment entered in this case by the District Judge below pursuant to Rule 54b) of the Federal Rules of Civil Procedure (Exh. E to Cahill Moving Aff't), memorializing the Court's dismissal of various claims against defendants Bear Stears [sic] & CO., Inc. and Bear Stearns Securities Corp. (the "Bear Stearns Judgment"). I immediately forwarded this judgment to plaintiffs' lead counsel in Houston Texas, with copies of the customary enclosures from this Court pertaining to procedures and deadlines associated with the filing of a Notice of Appeal.

3. Although I was aware that the Court would likely be entering a companion judgment pertaining to the other defendants in this case (the "Josephthal Defendants") did not receive any other judgment by mail from the District Court, either with the Bear Stearns Judgment or otherwise.

Timely retrieval of Josephthal Judgment:

4. On or about April 30, 2002, I received a call from Jeffrey N. Diamant, one of plaintiffs' lead attorneys, requesting urgently that I visit the District Court Clerk's office personally to retrieve a second judgment –

apparently concerning the Josephthal Defendants but not yet received. I did so that day, and was supplied with a similar Rule 54(b) Judgment pertaining to the Josephthal Defendants bearing files stamps indicating entry on March 15, 2002 (the "Josephthal Judgment"; Exh. D to Cahill Moving Aff't).

5. I faxed a copy of the Josephthal Judgment to Mr. Diamant's office at 1:53 Eastern Time on May 1, 2002, for inclusion with the Notices of Appeal that he was preparing for submission to this and the District Court. I do now know why my Office did not receive a copy of the Josephthal Judgment, as it had the Bear Stearns Judgment.

Knowledge of plaintiffs' intent to appeal from all aspects of summary judgment ruling, as to Bear Stearns and Josephthal defendants:

6. On or about February 1, 2001, I attended a status conference with lead counsel for all parties, before The Hon. Lawrence McKenna, U.S.D.J.. A number of items were discussed at that conference, including the possibility of settlement, the trial court's medium and long-term docket, and the impending certification of appeals from its summary judgment rulings against the Bear Stearns and Josephthal defendants. I distinctly recall plaintiffs' counsel stating its intent to appeal all such rulings, as they pertained to both groups of defendants, at that conference.

/s/ Jeffrey H. Weinberger
JEFFREY H. WEINBERGER

STARRY & ASSOCIATES, P.C.
1225 North Loop West, Suite 1101
Houston, Texas 77008

WARE, SNOW, FOGEL & JACKSON, L.L.P.
1111 Bagby, 49th floor
Houston, Texas 77002

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. dba FIRST AFFILIATED SECURITIES Plaintiffs, v. JOSEPHTHAL GROUP, INC., a corporation; JOSEPHTHAL HOLDINGS, INC., a corporation, JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual, BEAR STEARNS & CO., INC., a corporation; and BEAR STEARS SECURITIES CORP., a corporation Defendants.	96 Civ. 4156 (LMM) **NOTICE OF APPEAL** (Filed April 12 2002)

Notice is hereby given that JONATHAN E. S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES hereby appeals to the United States Court of Appeals for the Second Circuit from the Rule 54(b) Judgment entered by the United States District Court for the Southern District of New York entered in this action on the 14th day of March, 2002.

Dated: April 11, 2002

WARE, SNOW, FOGEL & JACKSON, L.L.P.

By /s/ Jeffrey Nolan Diamant
Jeffrey Nolan Diamant
(JND - 8897)

Attorneys for Plaintiff
Jonathan E.S. Bekhor

DECLARATION OF SERVICE

Jeff Diamant, declares under penalty of perjury: that I am over 18 years of age, duly admitted to practice *pro hac vice* before the Bar of this Court, and not a party to this action. On April 11, 2002, I served a copy of the foregoing Notice of Appeal by causing the same to be sent by facsimile and/or certified mail, return receipt requested to Lisa A. Cahill, Esq., counsel for defendants, at the following address and fax number: 1114 Avenue of the Americas, New York, New York 10036 (Fax No. (201) 479-6512).

Dated: Houston, Texas
April 11, 2002

/s/ Jeff Diamant
Jeff Diamant (JND - 8897)

FORM C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT

1. SEE NOTICE ON REVERSE
2. PLEASE TYPE OR PRINT.
3. ATTACH ADDITIONAL PAGES IF NECESSARY.

Name of Case:
Jonathan E.S. Bekhor, International Investment Holdings, Inc. and Bishop Saxony Corp. dba First Affiliated Securities
v.
Josephthal Group, Inc., Josephthal Holdings, Inc., Josephthal, Lyon & Ross, Incorporated, Dan Purjes, Bear, Stearns & Co., Inc., and Bear, Stearns Securities Corp.

District of Agency
Southern Dist. of NY

Date Filed in District Court or Agency
9/12/95 – California 1996 – transf. to NY

Date Notice of Appeal Filed
4/12/2002

Judge
Lawrence M. McKenna

District Court Docket No.
95-6065 (RMT)
96-4156 (LMM)

Is this a Cross Appeal?
[ ] Yes [X] No

Attorneys(s) for Appellant	Name	Address	Telephone
[x] Plaintiff	SEE ATTACHED		
[ ] Defendant			

Appellee
[ ] Plaintiff
[x] Defendant
Has Transcript been Prepared?

SEE ATTACHED

No.

Approx. Number of Transcript Pages	Number of Exhibits	Has this matter been before this Court previously?
N/A	N/A	[ ] Yes [x] No If Yes, state Case Name: Docket No.: Citation:

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:
SEE ATTACHED

ISSUES PROPOSED TO BE RAISED ON APPEAL:
SEE ATTACHED

A. JURISDICTION

1. Federal
[ ] U.S. a party
[ ] Federal question (U.S. not a party)
[x] Diversity
[ ] Other (specify):

_____

2. Appellate
[ ] Final Decision below
[ ] Interlocutory decision appealable as of right
[x] Order Certified by District Judge (specify): 54(b)
[ ] Other (specify): ____

IMPORTANT. COMPETE AND SIGN REVERSE SIDE OF THIS FORM.

B. DISTRICT COURT DISPOSITION
(Check as many as apply)

1. Stage of Proceedings

[ ] Pre-trial
[ ] During trial
[ ] After trial

2. Type of Judgment/Order Appealed

[ ] Default judgment
[ ] Dismissal/jurisdiction
[ ] Dismissal/Merit
[x] Summary judgment
[ ] Declaratory judgment
[ ] Judgment/court decision
[ ] Jury verdict
[ ] Judgment NOV
[ ] Directed verdict
[ ] Other (specify):

3. Relief

[x] Damages:
___ Sought: $30-50mil.
___ Granted: n/a
___ Denied: $n/a

[ ] Injunctions:
___ Preliminary
___ Permanent
___ Granted
___ Denied

C. NATURE OF SUIT
(Check as many as apply)

Federal Statutes
Antitrust
Bankruptcy
[ ] Banks/Banking
[ ] Civil Rights
Commerce, routes and tariffs
Commodities
[ ] Other (specify):
[ ] Freedom of Information
[ ] Immigration
[ ] Labor
[ ] OSHA
[ ] Securities
[ ] Communications
[ ] Consumer Protection
[ ] Copyright [ ] Patent
[ ] Trademark
[ ] Election
[ ] Energy
[ ] Environmental

[ ] Soc. Security
[ ] Tax

2. Torts
[ ] Admiralty/Maritime
[ ] Assault/Defamation
[ ] FELA
[ ] Product Liability/ Warranty
[x] Other (specify): conversion, unjust enrichment, prima facie tort, breach/fiduciary duty, intentional interference w/business relationship, fraud

3. Contracts
[ ] Admiralty/Maritime
[ ] Arbitration
[x] Commercial
[ ] Employment
[ ] Insurance
[x] Negotiable Instruments
[ ] Other (Specify):

4. Prisoner Petitions
[ ] Civil Rights
Habeas Corpus
___ 2254
___ 2255
[ ] Mandamus
[ ] Parole
[ ] Vacate Sentence
[ ] Other

5. Other
[ ] Forfeiture/Penalty
[ ] Real Property
[ ] Treaty (specify): ____
[x] Other (specify): conspiracy

6. General
[ ] Arbitration
[ ] Attorney Disqualification
[ ] Class Action
[ ] Counsel fees
[ ] Shareholder Derivative
[ ] Transfer

7. Will appeal raise constitutional issue?
[ ] Yes [x] No
Will appeal raise a matter of first impression?
[ ] Yes [x] No

Is any matter relative to this case pending below?
[x] Yes [ ] No (specify):

To your knowledge, is there any case now pending or about to be brought before this Court or any other court or

administrative agency which (A) arises from substantially the same case or controversy as this appeal? [ ] Yes [x] No

(B) involves an issue that is substantially the same, similar, or related to an issue in this appeal?
[x] Yes[ ] No

If yes, state whether [ ] "A" or [ ] "B" or [ ] both, and provide:

Case Name:
Matocha v. First Allied Securities

Docket No.
2001-162961

Citation:

Court or Agency:
133rd Dist. Ct., Harris County, TX

Name of Appellant:

Date:

4/19/02

Signature of Counsel of Record
/s/ Jeffrey Nolan Diamant

NOTICE TO COUNSEL

Once you have filed your Notice of Appeal with the District Court or the Tax Court and have paid the $5 filing fee, you have only ten (10) days in which to docket your appeal. You must take the following steps within those ten (10) days:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Court of Appeals.

2. File the Court of Appeals Transcript Information/Civil Appeal Form (Form D) with the Clerk of the Court of Appeals.

3. Pay the $100 docketing fee to the Clerk of the Untied States District Court, unless you are authorized to prosecute the appeal without ___ payment.

IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN TEN (10) DAYS, YOUR APPEAL WILL BE DISMISSED.

(NOTE: This form is not required of non-attorney pro se litigants.)

SEE THE CIVIL APPEALS MANAGEMENT PLAN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

NOTICE CONCERNING DISCLOSURE OF INTERESTED PARTIES

Rule 0.15 of the local rules of this Court supplementing the Federal Rules of Appellate Procedure provides as follows:

0.15 Disclosure of Interested Parties.

To enable the judges of the court to evaluate possible disqualification, counsel for all private (nongovernment) parties, in an appeal, or in a motion or other proceeding related to an appeal, shall in all cases submit when such party's initial brief is due, or upon request of the Clerk, an identification of any corporate parent of the party.

ATTACHMENT TO FORM C
CIVIL APPEAL PRE-ARGUMENT STATEMENT

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

Plaintiffs negotiated a deal to sell First Affiliated Securities, a broker-dealer in the securities business, to the Josephthal Defendants. The Josephthal Defendants made a cash payment that is alleged to have been intended as an advance. The advance was documented with a promissory note. The promissory note was secured with collateral in the form of, among other things, First Affiliated Securities' "customer accounts."

After assurances to the contrary, it is alleged that the Josephthal Defendants wrongfully called the promissory note and improperly and unlawfully foreclosed on the collateral – the customer accounts of First Affiliated Securities. The Bear, Stearns Defendants, First Affiliated Securities' clearing firm, denied First Affiliated access to these accounts and literally transferred the accounts to the Josephthal Defendants. It is alleged that, among other wrongdoings, the Bear Stearns Defendants conspired with the Josephthal Defendants to wrongfully effect this transfer of customer accounts.

After the transfer was effected, and Plaintiff Jonathan E.S. Bekhor discovered the transfer, Mr. Bekhor flew to New York to attend a meeting with the Josephthal Defendants' key principal, Don Purjes. It is alleged that, under physical and economic duress, Mr. Bekhor was forced to sign a release agreement. It is also alleged that the release agreement was invalid for reasons other than the duress.

All Defendants moved for summary judgment. Summary judgment was granted dismissing the Josephthal Defendants in their entirety on the grounds that they have been previously released of liability for this wrongdoing. Several of the independent claims against the Bear, Stearns Defendants were also dismissed on summary judgment on legal or factual grounds other than release.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

The Plaintiffs will appeal the Court's summary judgment rulings with respect to both the Josephthal Defendants and the Bear, Stearns Defendants. It is alleged by the Plaintiffs that granting of summary judgment in both instances was error. Additionally, the Plaintiffs are currently intending to appeal the decision in this case to transfer venue from Los Angeles, California, where it was originally filed on September 12, 1995 under case number 95-6065 (RMT) to New York City in 1996.

ATTACHMENT TO FORM C
CIVIL APPEAL PRE-ARGUMENT STATEMENT

ATTORNEY INFORMATION

ATTORNEYS FOR PLAINTIFF/APPELLANT:

Don Jackson
Jeffrey Nolan Diamant
Ware, Snow, Fogel &
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1111 Bagby, 49th Floor
Houston, TX 77002

PHONE: (713) 659-6400
FAX: (713) 659-6262

Stuart Starry
Stuart Starry & Associates
1225 N. Loop West,
Suite 1101
Houston, TX 77008

PHONE: (713) 655-7350
FAX: (713) 863-0751

ATTORNEYS FOR DEFENDANTS/APPELLEES:

Ed Little
Lisa Cahill
Zuckerman, Spaeder,
Goldstein, Taylor &
Kolker, L.L.P.
1114 Avenue of the Americas
New York, NY 10036

PHONE: (212) 479-6500
FAX (212) 479-6512

FORM D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRANSCRIPT INFORMATION
CIVIL APPEAL

To be completed by counsel for appellant in civil appeal from distinct court within ten days after filing notice of appeal.

THIS SECTION TO BE COMPLETED BY COUNSEL FOR APPELLANT

CASE TITLE

Jonathan E.S. Bekhor, International Investment Holdings, Inc., et al.

vs.

Josephthal Group, Inc., Josephthal Holdings, Inc., et al.

DISTRICT
Southern District of New York

JUDGE
Lawrence M. McKenna

COURT REPORTER
N/A

DOCKET NUMBER
96-4156 (LMM)

APPELLANT
Jonathan E.S. Bekhor, et al.

COUNSEL FOR APPELLANT
Ware, Snow, Fogel & Jackson

TRANSCRIPT ORDER – Must be completed

DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATES).

I am ordering a transcript.
I am not ordering a transcript
Reason:
[ ] Daily copy is available
[x] Other-Attach explanation **

**No transcript is being ordered as no oral hearings were held on the summary judgment issues being appealed herein.

METHOD OF PAYMENT

[ ] Funds [ ] CJA Voucher (cja 21)

[ ] PREPARE TRANSCRIPT OR PRE-TRIAL PROCEEDINGS

[ ] PREPARE TRANSCRIPT OF TRIAL

[ ] PREPARE TRANSCRIPT OR OTHER POST-TRIAL PROCEEDINGS

[ ] PREPARE (Other: Specify)

DELIVER TRANSCRIPT TO: (NAME, ADDRESS, TELEPHONE)

I certify that I have made satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)). I understand that unless I have already ordered the transcript, I shall order its preparation at the time required by the Civil Appeals Management Plan, F.R.A.P. and the local rules.

COUNSEL'S SIGNATURE
/s/ Jeffrey Nolan Diamant

DATE 4/19/02

COURT REPORTER ACKNOWLEDGMENT

To be completed by court reporter. Return one copy to
Clerk, U.S. Court of Appeals

DATE ORDER RECEIVED

ESTIMATED COMPLETION DATE

ESTIMATED NUMBER OF PAGES

SIGNATURE OF COURT REPORTED

DATE

ZUCKERMAN SPAEDER LLP

ATTORNEYS AT LAW

1114 AVENUE OF THE AMERICAS
27th FLOOR
NEW YORK, NEW YORK 10036
(212) 479-6500
FACSIMILE (212) 479-6512

LISA A. CAHILL
(212) 479-6506
LCAHILL@ZUCKERMAN.COM

April 30, 2002

Via Facsimile & Mail

Stuart Starry, Esq.
Stuart Starry & Associates
1225 N. Loop West, Suite 1101
Houston, TX 77008

Jeffrey Nolan Diamant, Esq.
Ware, Snow, Fogel & Jackson
Texaco Heritage Plaza, 49th Floor
1111 Bagby
Houston, TX 77002-2548

Re: Recently Filed Notice of Appeal

Dear Stuart and Jeff:

We are in receipt of your Notice of Appeal. It purports to notice the appeal of the judgment (singular), despite there being two judgments on file. It purports to notice the appeal of a judgment "entered in this action on the 14th day of March, 2002" when, in fact, no judgment was entered on that date.

Please let us know which judgment you are purportedly appealing.

Very truly yours,
/s/ Lisa A. Cahill
Lisa A. Cahill

cc: Don Jackson, Esq.
Jeffrey Weinberger, Esq.

STARRY & ASSOCIATES, P.C.
1225 North Loop West, Suite 1101
Houston, Texas 77008

WARE, SNOW, FOGEL & JACKSON, L.L.P.
1111 Bagby, 49th floor
Houston, Texas 77002

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN E. S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. dba FIRST AFFILIATED SECURITIES Plaintiff, v. JOSEPHTHAL GROUP, INC., A CORPORATION; JOSEPHTHAL HOLDINGS, INC., a corporation; JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual, BEAR, STEARNS AND CO., INC., a corporation; and BEAR, STEARNS SECURITIES CORP., a corporation Defendants.	96 Civ. 4156 (LMM) **SUPPLEMENT TO NOTICE OF APPEAL**

Notice is hereby given that JONATHAN E. S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS,

INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES hereby file this Supplement to the Notice of Appeal filed herein on April 12, 2002 in order to clarify their intent in response to correspondence from counsel for Defendants dated May 1, 2002. as such, JONATHAN E. S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES appeal to the United States Court of Appeals for the Second Circuit from the Rule 54(b) Judgments entered by the United States District Court for the Southern District of New York. There are, in fact, two Judgments rendered by this Court, one dated March 14, 2002 and one dated March 13, 2002. Both were entered on the docket on March 15, 2002. Both Federal Rule of Civil Procedure 54(b) Certification Orders were attached to Plaintiff's Form C filed with the United States Court of Appeals for the Second Circuit along with one of the two Judgments. The other Judgment was omitted and is attached hereto for clarification. The Court of Appeals is aware of this and has requested that we take no action to clarify it as they have indicated that no action is necessary.

Dated: May 1, 2002

WARE, SNOW, FOGEL & JACKSON, L.L.P.

By Jeffrey Nolan Diamant
Jeffrey Nolan Diamant
(JND – 8897)
Attorneys for Plaintiffs
Jonathan E. S. Bekhor

DECLARATION OF SERVICE

Jeff Diamant, declares under penalty of perjury: that I am over 18 years of age, duly admitted to practice *pro hac vice* before the Bar of this Court, and not a party to this action. On May 1, 2002, I served a copy of the foregoing Notice of Appeal by causing the same to be sent by facsimile and/or certified mail, return receipt requested to Lisa A. Cahill, Esq., counsel for defendants, at the following address and fax number: 1114 Avenue of the Americas, New York, New York 10036 (Fax No. (212) 479-6512).

Dated: Houston, Texas
May 1, 2002

/s/ Jeff Diamant
Jeff Diamant (JND – 8897)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x (Filed Mar 13 2002)

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC., and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES,

Plaintiffs,

-against-

JOSEPHTHAL GROUP, INC., a corporation; JOSEPHTHAL HOLDINGS, INC., a corporation; JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation;

96 CIVIL 4156
(LMM)
Rule 54B
JUDGMENT

Doc # 121

DAN PURJES, an individual,
BEAR, STEARNS AND CO.,
INC., a corporation, and BEAR,
STEARNS SECURITIES CORP.,
a corporation

Defendants.

The parties having made various motions for summary judgment; Josephthal's summary judgment motion having been granted in its entirety; defendant Bear Stearns' motion for summary judgment having been partially granted; and application having been made for certification pursuant to Fed. R. Civ. P. 54(b), and the matter having come before the Honorable Lawrence M. McKenna, United States District Judge, and the Court, on March 6, 2002, having rendered its Order that there is no just reason for delay, entering final judgment in favor of the Josephthal defendants as to all of plaintiffs' claims and certifying that all of plaintiffs' claims against the Josephthal defendants are ready for appeal, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated March 6, 2002, that there is no just reason for delay, final judgment is entered in favor of the Josephthal defendants as to all of plaintiffs' claims, and the Court certifies that all of plaintiffs' claims against the Josephthal defendants are ready for appeal.

Dated: New York, New York
March 13, 2002

JAMES M. PARKISON
Clerk of Court

BY: [Illegible]
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 3/15/02

STARRY & ASSOCIATES, P.C.

1225 North Loop West, Suite 1101
Houston, Texas 77008

WARE, SNOW, FOGEL & JACKSON, L.L.P.
1111 Bagby, 49th floor
Houston, Texas 77002

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN E. S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. dba FIRST AFFILIATED SECURITIES Plaintiff, v. JOSEPHTHAL GROUP, INC., A CORPORATION; JOSEPHTHAL HOLDINGS, INC., a corporation; JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual, BEAR, STEARNS AND CO., INC., a corporation; and BEAR, STEARNS SECURITIES CORP., a corporation Defendants.	96 Civ. 4156 (LMM) AMENDED **NOTICE OF APPEAL** (Filed May 2, 2002)

Notice is hereby given that JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS,

INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES hereby file this Supplement to the Notice of Appeal filed herein on April 12, 2002 in order to clarify their intent in response to correspondence from counsel for Defendants dated May 1, 2002. As such, JONATHAN E. S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES appeal to the United States Court of Appeals for the Second Circuit from the Rule 54(b) Judgments entered by the United States District Court for the Southern District of New York. There are, in fact, two Judgments rendered by this Court, one dated March 14, 2002 and one dated March 13, 2002. Both were entered on the docket on March 15, 2002. Both Federal Rule of Civil Procedure 54(b) Certification Orders were attached to Plaintiff's Form C filed with the United States Court of Appeals for the Second Circuit along with one of the two Judgments. The other Judgment was omitted and is attached hereto for clarification. The Court of Appeals is aware of this and has requested that we take no action to clarify it as they have indicated that no action is necessary.

Dated: May 1, 2002

WARE, SNOW, FOGEL & JACKSON, L.L.P.

By Jeffrey Nolan Diamant
Jeffrey Nolan Diamant
(JND – 8897)
Attorneys for Plaintiffs
Jonathan E. S. Bekhor

DECLARATION OF SERVICE

Jeff Diamant, declares under penalty of perjury: that I am over 18 years of age, duly admitted to practice *pro hac*

vice before the Bar of this Court, and not a party to this action. On May 1, 2002, I served a copy of the foregoing Notice of Appeal by causing the same to be sent by facsimile and/or certified mail, return receipt requested to Lisa A. Cahill, Esq., counsel for defendants, at the following address and fax number: 1114 Avenue of the Americas, New York, New York 10036 (Fax No. (212) 479-6512).

Dated: Houston, Texas
May 1, 2002

/s/ Jeff Diamant
Jeff Diamant (JND – 8897)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC., and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES,

Plaintiffs,

-against-

JOSEPHTHAL GROUP, INC., a corporation; JOSEPHTHAL HOLDINGS, INC., a corporation; JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual, BEAR, STEARNS AND CO., INC., a corporation; and BEAR,

96 **CIVIL** 4156
(LMM)

RULE 54B
JUDGMENT

(Filed Mar. 13, 2002)

Doc # 121

STEARNS SECURITIES CORP.,
a corporation

Defendants.

x

The parties having made various motions for summary judgment; Josephthal's summary judgment motion having been granted in its entirety; defendant Bear Stearns' motion for summary judgment having been partially granted; and application having been made for certification pursuant to Fed. R. Civ. P. 54(b), and the matter having come before the Honorable Lawrence M. McKenna, United States District Judge, and the Court, on March 6, 2002, having rendered its Order that there is no just reason for delay, entering final judgment in favor of the Josephthal defendants as to all of plaintiffs' claims and certifying that all of plaintiffs' claims against the Josephthal defendants are ready for appeal, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated March 6, 2002, that there is no just reason for delay, final judgment is entered in favor of the Josephthal defendants as to all of plaintiffs' claims, and the Court certifies that all of plaintiffs' claims against the Josephthal defendants are ready for appeal.

Dated: New York, New York
March 13, 2002

JAMES M. PARKISON
Clerk of Court

BY: [Illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC. and BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES,	:	Docket No. 02-7401
Plaintiffs/Appellants,	:	
-against-	:	
JOSEPHTHAL GROUP, INC., a corporation; JOSEPHTHAL HOLDINGS, INC., a corporation; JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation; DAN PURJES, an individual; BEAR STERNS AND CO., INC., a corporation; and BEAR STEARNS SECURITIES CORP., a corporation,	:	
Defendants/Appellees.	:	

MOTION OF DEFENDANTS/APPELLEES JOSEPHTHAL GROUP, INC., JOSEPHTHAL HOLDINGS, INC., JOSEPHTHAL LYON & ROSS, INCORPORATED AND DAN PURJES TO DISMISS THE PURPORTED APPEAL PURSUANT TO F.R.A.P. 4

Defendants/appellees Josephthal Group, Inc,, Josephthal Holdings, Inc., Josephthal Lyon & Ross, Incorporated, and Dan Purjes (hereinafter, the "Josephthal Defendants"), pursuant to Federal Rules of Appellate Procedure 3(a) and (c), 4(a) and 27(a), respectfully move for an Order

dismissing the purported appeal of the Federal Rule of Civil Procedure 54(b) Judgment entered in this action as docket number 121 by the United States District Court for the Southern District of New York on March 15, 2002 (the "Josephthal Judgment"). As discussed more fully below, because no notice of appeal was filed within 30 days of entry of the Josephthal Judgment, which dismissed all pending claims against the Josephthal Defendants, this appeal must be dismissed under Rule 4(a) insofar as it applies to the Josephthal Defendants.

Procedural History

This action was the subject of three separate motions for summary judgment before the United States District Court for the Southern District of New York (the "District Court"), respectively filed by: (i) the Josephthal Defendants; (ii) defendants/appellees Bear, Stearns and Co., Inc. and Bear Stearns Securities Corp. (the "Bear Stearns Defendants," referred to collectively with the Josephthal Defendants as "Defendants"); and (iii) plaintiffs/appellants Jonathan Bekhor, International Investment Holdings, Inc. and Bishop Saxony Corp. (hereinafter "Plaintiffs"). *See* the annexed Affidavit of Lisa Cahill in support of this motion ("Cahill Aff."), ¶ 2.

All three motions were filed with the District Court on or before December 15, 1999, and decided by the Honorable Lawrence M. McKenna in a Memorandum and Order dated October 11, 2000 (hereinafter the "Memorandum and Order"). Cahill Aff. ¶ 3 and Exh. A thereto. In its Memorandum and Order, the District Court granted the Josephthal Defendants' motion for summary judgment, dismissing all of Plaintiffs' claims against these defendants. *Id.* In

addition, the District Court granted the Bear Sterns Defendants' motion for summary judgment on four of Plaintiffs' seven claims against them. *Id.*[1]

More than a year later, plaintiffs drafted and filed two separate certification orders to correspond to proposed separate judgments in favor of the Josephthal Defendants and the Bear Stearns Defendants. These orders were both signed by the Court on March 6, 2002. *Id.* ¶¶ 4-5 and Exhs. B and C thereto.

On March 13, 2002, Plaintiffs filed a draft Rule 54(b) Judgment reflecting the dismissal of all Plaintiffs' claims against the Josephthal Defendants as set forth in the Memorandum and Order. That Josephthal Judgment was executed by the Clerk of the District Court and then entered as docket no. 121 on March 15, 2002. *Id.* ¶ 6 and Exh. D thereto.

On March 14, 2002, Plaintiffs filed a separate draft Rule 54(b) Judgment reflecting the dismissal of four of Plaintiffs' seven claims against the Bear Sterns Defendants, which was signed by the clerk of the District Court and then entered as docket no. 122 on March 15, 2002 (the "Bear Stearn Judgment"). *Id.* ¶ 7 and Exh. E thereto.

On April 12, 2002, Plaintiffs filed one Notice of Appeal. *Id.* ¶ 8 and Exh. F. The Notice of Appeal notices that plaintiffs "appeal[] . . . from the Rule 54(b) Judgment . . . entered on the 14th day of March, 2002," even though no judgment was entered on that date. *Id.* ¶ 8 and Exh. F thereto.

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[1] Plaintiffs' motions for summary judgment as against the Defendants' counterclaims were granted in part and denied in part, but are not the subject of this appeal or motion.

By cover letter dated April 19, 2002, Plaintiffs forwarded a packet of materials to this Court, including the Notice of Appeal and a copy of the Bear Stearns Judgment (docket no. 122). *Id.* ¶ 9 and Exh. G thereto. The Josephthal Judgment (docket no. 121) was not included in this packet. *Id.*

As a courtesy, Defendants' counsel sent a letter dated April 30, 2002 alerting Plaintiffs' counsel that they appeared to have appealed only one of the two judgments entered in the District Court. *Id.* ¶ 10 and Exh. H thereto. Thereafter, by cover letter to the District Court dated May 1, 2002, Plaintiffs' counsel, "in, order to clarify the original Notice of Appeal filed . . . on April 12, 2002," sent a new notice of appeal, this time attaching the Josephthal Judgment. *Id.* ¶ 11 and Exh. I thereto. The notice of appeal copied to both District Court Judge McKenna and Defendants' counsel was labeled a "Supplement to Notice of Appeal," but Defendants' counsel never received a file-stamped copy of this "Supplement" from the District Court or from Plaintiffs' counsel. *Id.* Instead, Defendants' counsel received an exact copy of the "Supplement to Notice of Appeal" bearing a filed stamp, except that "Supplement to" apparently had been covered up, and in its place the word "Amended" was written by hand, creating a would-be "Amended Notice of Appeal." *Id.* ¶ 12 and Exh. J thereto. The text of this document continues to describe the "Amended Notice of Appeal" as a "Supplement to Notice of Appeal." *Id.*[2]

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[2] Defendants do not believe the "Supplement" to the Notice of Appeal was ever filed (see Cahill Aff. ¶ 11), but are not aware of any improprieties with respect to its transformation into an "Amended Notice of Appeal." Still, the apparent alteration between its forwarding

(Continued on following page)

The Amended Notice of Appeal is file-stamped May 2, 2002. *Id.* Within the body of its Amended Notice of Appeal, Plaintiffs informed the District Court that this Court had allegedly instructed Plaintiffs' counsel to "take no action" because "no action is necessary" regarding their original failure to attach or otherwise file a separate notice of appeal for the Josephthal Judgment. *Id.* Exh. J at 2.

Argument

Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure requires a party to file an appeal within 30 days of entry of judgment. Fed. R. App. P 4(a)(1)(A) ("In a civil case . . . the notice of appeal . . . must be filed with the district clerk within 30 days after the judgment or order appealed from is entered"). The notice of appeal must designate, *inter alia*, "the judgment, order, or part thereof being appealed. . . . " Fed. R. App. P. 3(c)(1)(B). "If a party files a notice of appeal beyond the time provided in Federal Rule of Appellate Procedure 4(a), the court of appeals lacks subject matter jurisdiction to hear the appeal." *Cohen v. Empire Blue Cross and Blue Shield*, 142 F.3d 116, 119 n.1 (2d Cir. 1998).

The United States Supreme Court has described Rule 4(a) as "mandatory and jurisdictional," *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam);

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to Judge McKenna and its filing with the District Court is relevant to the instant motion in that it reflects Plaintiffs' acknowledgement that the original Notice of Appeal was inadequate, and their desperation to have this new notice of appeal treated as if it had been filed within 30 days of entry of the Josephthal Judgment, when in fact, it plainly was not.

as such, the 30-day time requirements "have been treated as especially rigid, and a federal court's authority to extend or suspend those limits is narrowly limited." *United States ex rel. McAllan v. City of New York*, 248 F.3d 48, 51 (2d Cir. 2001).

Although it is true that under Rule 4(a)(5), a district court may extend an appeal period upon motion and a showing of good cause or excusable neglect, *Mendes Junior Int'l Co. v. Banco Do Brasil. S.A.*, 215 F.3d 306, 312 (2d Cir. 2000), the appellant must " 'so move[ ] *no later* than 30 days' after the expiration of the original time to file a notice of appeal under Rule 4(a)." *Goode v. Winkler*, 252 F.3d 242, 245 (2d Cir. 2001) (quoting Fed. R. App. P 4(a)(5)(A)(i)) (emphasis in *Winkler*).

Applying these rules to the instant case, this Court has no jurisdiction to hear this appeal to the extent Plaintiffs seek review of the Josephthal Judgment. Plaintiffs failed to file a notice of appeal with respect to the Josephthal Judgment within 30 days of its entry date, March 15, 2002. Plaintiffs filed only *one* timely Notice of Appeal, on April 12, 2002, which referenced only *one* judgment. Plaintiffs then forwarded their one Notice of Appeal to this Court, again attaching only one judgment – the Bear Stearns Judgment – which encompassed neither the Josephthal Judgment nor any of the District Court rulings concerning the Josephthal Defendants. The time within which Plaintiffs were required to file notice of appeal for the Josephthal Judgment expired on April 15, 2002 – 30 days after its March 15, 2002 entry date.

The Plaintiffs' "Supplement to the Notice of Appeal," later changed by Plaintiffs to an "Amended Notice of Appeal," is legally meaningless here, as no Federal Rule of

Appellate Procedure provides for either such pleading, and certainly no rule allows the filing date of an amended notice of appeal to "relate back" to the date of the original notice of appeal. *See, e.g., Winkler*, 252 F.3d at 245 (dismissing appeal after rejecting practice of district court's *pro se* office of back-dating motions for extension of time to file a notice of appeal to the date that an untimely notice of appeal was filed). The only "relation back" provision concerning notices of appeal is contained in Rule 4(d),[3] which has no application here, and Plaintiffs may not unilaterally fabricate a new relation back rule to overcome their fatal error. Indeed, reading a "relation back" provision into Plaintiffs' Amended Notice of Appeal here would render Rule 4(a)'s 30-day deadline meaningless, as a party could simply piggy-back on any timely notice of appeal by labeling the new notice of appeal as an "amendment" to the timely notice.

Under the circumstances, the proper and only corrective measure that was available to Plaintiffs after April 15, 2002 was the filing of a motion for an extension of time to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5). At the time of Defendants' April 30, 2002 letter pointing out that only one judgment had been appealed, Plaintiffs still had more than two weeks (until May 15, 2002 – 30 days after the expiration of the original April 15, 2002 deadline) to seek an extension of time to file

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[3] Federal Rule of Appellate Procedure 4(d) provides that "[i]f a notice of appeal . . . is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted." Fed. R. App. P. 4(d).

a notice of appeal in connection with the Josephthal Judgment. Plaintiffs chose to ignore this route, and instead to simply file a new notice of appeal, outside the 30-day deadline, without seeking leave of court, and without the requisite Rule 4(a)(5) showing of good cause or excusable neglect. This does not satisfy Rule 4. *See Cohen v. Empire Blue Cross and Blue Shield*, 142 F.3d 116, 119 n.1 (2d Cir. 1998) (dismissing a motion for an extension of time to file a notice of appeal because "courts are not permitted to treat, as a motion for an extension, a bare notice of appeal – even one from a pro se litigant – that is filed outside the time provided in Rule 4(a)(1) but within the 30-day grace period"). When Plaintiffs failed to file a Rule 4(a)(5) motion, they ignored this Court's frequent warnings about the importance of strict adherence to appellate deadlines. *See, e.g., United States v. Raimondi*, 760 F.2d 460, 462 (2d Cir. 1985) ("The lawyer who assumes this Court will relieve him of an onerous but manageable deadline . . . does so at his own peril") (footnote omitted).

Plaintiffs' counsel undoubtedly will claim that they failed to file a motion for an extension of time because this Court "requested" that they not do anything. Indeed, that is the position Plaintiffs took before the District Court within their signed and filed Amended Notice of Appeal. *See* Exh. J to Cahill Aff. at 2 (asserting within its Amended Notice of Appeal that this Court "is aware of" Plaintiffs' failure to file a notice of appeal in connection with the Josephthal Judgment, and alleging that this Court "has requested that we take no action to clarify it as they have indicated that no action is necessary"). Defendants seriously doubt that this Court "requested" that plaintiffs "take no action," or otherwise took any substantive position on this matter without first hearing from Defendants.

Defendants defer to this Court on this factual issue, but respectfully suggest that Plaintiffs' attempt to cloak their actions with this Court's approval, like its frantic labeling and re-labeling of its new notice of appeal, only reflects its desperation to avoid the harsh result of failing to abide by Rule 4.

Finally, Rule 3(c)(4) of the Federal Rules of Appellate Procedure also will not salvage Plaintiffs' attempted appeal of the Josephthal Judgment. Rule 3(c)(4) provides that "[a]n appeal must not be dismissed for informality of form . . . or for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P 3(c)(4). The test for determining whether a notice of appeal is adequate "is whether it is objectively clear that a party intended to appeal." Fed. R. App. P. 3(c) advisory committee note (1993 amendment). The circumstances of the instant action do not remotely satisfy this standard.

First, Rule 3(c)(4) by its terms forgives only failures "to name a party *whose intent to appeal* is otherwise clear." Fed. R. App. P. 3(c)(4).[4] The rule does *not* forgive failures to name the party *against whom* the appeal is being taken, as is the case here. Nor does the rule forgive the requirement that the notice of appeal "designate the judgment . . . being appealed." Fed. R. App. P. 3(c)(1)(B). We expect that Plaintiffs will ask this Court to forgive both failures, and review a judgment which was not designated in their

[4] *See, e.g., Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 554 (2d Cir. 2000) (finding one defendant's "intent to appeal" under Rule 3(c)(4) clear from notice of appeal filed by co-defendant, where the notice of appeal specified in a parenthetical reference that all defendants were appealing).

Notice of Appeal, against parties which were not identified in the Notice of Appeal. This the Court cannot do.

No federal court to our knowledge has ever stretched Rule 3(c)(4) to impute, from the filing of one appeal, on one judgment, in connection with one set of defendants, an intent to appeal a different judgment, with a different docket entry number, covering a different set of claims against an entirely different set of parties. Indeed, expanding Rule 3(c)(4) to protect Plaintiffs here would obviate Rule 3(b)(2), which permits consolidated appeals where separate "timely" notices of appeal have been filed. Under Plaintiffs' approach, separate appeals could be consolidated on appeal so long as *one* of the judgments was timely appealed. This directly conflicts with the Federal Rules of Appellate Procedure.[5]

The inescapable conclusion is that because Plaintiffs' counsel filed neither a notice of appeal of the Josephthal Judgment, nor a timely motion for an extension of time, this Court "lacks subject matter jurisdiction to hear the appeal." *Cohen*, 142 F.3d at 119 n.1. As the Supreme Court has observed, "[f]iling deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States v.*

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[5] *See e.g., Agee v. Paramount Communications Inc.*, 114 F.3d 395, 399-400 (2d Cir. 1997) (finding no appellate jurisdiction over an attorney's appeal, despite the timely filing of a notice of appeal by other plaintiffs, where the attorney failed to list himself as a party to the appeal in the caption or body of that notice of appeal).

Locke, 471 U.S. 84, 101 (1985). Dismissal is "mandatory." *Griggs*, 459 U.S. at 61.

Conclusion

For the foregoing reasons, the Josephthal Defendants respectfully request that the purported appeal of the Josephthal Judgment be dismissed, and this case remanded to the District Court with instructions to enter a final judgment against Plaintiffs on all their claims against the Josephthal Defendants, without leave to appeal.

Dated: New York, New York
July 11, 2002

Respectfully Submitted,

ZUCKERMAN SPAEDER LLP

By: /s/ Edward J.M. Little /KFC
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& Co. Inc., and Dan Purjes

Declaration of Service

On this, the 11th day of July, 2002, 1 served the within Motion of Defendants/Appellees Josephthal Group,

Inc., Josephthal Holdings, Inc., Josephthal Lyon & Ross, Incorporated, and Dan Purjes to Dismiss the Purported Appeal Pursuant to F.R.A.P. 4, along with the Affidavit of Lisa A. Cahill in support thereof executed July 9, 2002, and exhibits thereto, by causing the same to be hand delivered to one of plaintiffs' attorneys, and causing the same to be delivered by overnight mail to other of plaintiffs' attorneys, as specified below:

Stuart J. Starry, Esq. (by Federal Express)
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New York, NY 10013

/s/ Kevin Clines
Kevin F. Clines

INDIV CLOSED
LG 7

GENERAL DOCKET FOR
Second Circuit Court of Appeals

Filed: 4/15/02

Court of Appeals Docket #: 02-7401
Nsuit: 4190 CONTRACT-Other Contract Action
Bekhor, et al v. Josephthal Group, et al
Appeal from: U.S. District Court SDNY

Case type information:

1) Civil
2) Private
3) none

Lower court information:

District: 0208-01: 96-cv-4156
Trial Judge: Lawrence M. McKenna
Magistrate Judge: Ronald L. Ellis
Date Filed: 6/5/96
Date order/judgment: 3/14/02
Date NOA filed: 4/12/02

Fee status: paid

Prior cases:

None

Current cases:

None

Panel Assignment:

INDIV CLOSED
LG 7

Proceedings include all events.
02-7401 Bekhor, et al v. Josephthal Group, et al

JONATHAN E.S. BEKHOR Plaintiff-Counter-Defendant-Appellant	Jeffrey Nolan Diamant, Esq. 49th Floor [COR LD NTC ret] Ware, Snow, Fogel & Jackson, LLP 1111 Bagby Houston, TX 77002
INTERNATIONAL INVESTMENT HOLDINGS, INC. Plaintiff-Counter-Defendant-Appellant	Jeffrey Nolan Diamant, Esq. (See above) [COR LD NTC ret]
BISHOP SAXONY CORP. dba First Affiliated Securities, Inc. Plaintiff-Counter-Defendant-Appellant	Jeffrey Nolan Diamant, Esq. (See above) [COR LD NTC ret]
v.	
JOSEPHTHAL GROUP, INC., a corporation Defendant-Counter-Claimant-Appellee	Lisa A. Cahill, Esq. 212-479-6500 [COR LD NTC ret] Zuckerman, Spaeder 1114 6th Ave. New York, NY 10036-2402
JOSEPHTHAL HOLDINGS, INC., a corporation Defendant-Counter-Claimant-Appellee	Lisa A. Cahill, Esq. (See above) [COR LD NTC ret]

JOSEPHTHAL, LYON & ROSS, INCORPORATED, a corporation Defendant-Counter-Claimant-Appellee	Lisa A. Cahill, Esq. (See above) [COR LD NTC ret]
DAN PURJES, an individual Defendant-Counter-Claimant-Appellee	Lisa A. Cahill, Esq. (See above) [COR LD NTC ret]
BEAR STERNS & CO., INC., a corporation Defendant-Counter-Claimant-Appellee	Lisa A. Cahill, Esq. (See above) [COR LD NTC ret]
BEAR STERNS SECURITIES CORP., a corporation Defendant-Counter-Claimant-Appellee	Lisa A. Cahill, Esq. (See above) [COR LD NTC ret]

INDIV	CLOSED
LG	7

Proceedings include all events.
02-7401 Bekhor, et al v. Josephthal Group, et al

Official Caption 1/

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Docket No. [s] : 02-7401

JONATHAN E.S. BEKHOR, INTERNATIONAL INVESTMENT HOLDINGS, INC., BISHOP SAXONY CORP. d/b/a FIRST AFFILIATED SECURITIES, INC.,

Plaintiffs-Counter-Defendants-Appellants,

v.

JOSEPHTHAL GROUP, INC., a corporation, JOSEPHTHAL HOLDINGS, INC., a corporation, JOSEPHTHAL,

LYON & ROSS, INCORPORATED, a corporation, DAN PURJES, an individual, BEAR STERNS & CO., INC., a corporation and BEAR STERNS SECURITIES CORP., a corporation,

Defendants-Counter-Claimants-Appellees.

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Authorized Abbreviated Caption 2/

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Docket No. [s] : 02-7401
BEKHOR, ET AL. V. JOSEPHTHAL GROUP, INC., ET AL.

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1/ Fed. R. App. P. Rule 12 [a] and 32 [a].
2/ For use on correspondence and motions only.

INDIV	CLOSED
LG	7

Proceedings include all events.
02-7401 Bekhor, et al v. Josephthal Group, et al

4/15/02 Copy of notice of appeal and district court docket entries on behalf of Appellant Jonathan E.S. Bekhor, Appellant Int'l Investment, Appellant Bishop Saxony Corp. filed. [02-7401] Form C due on 4/22/02. Form D due on 4/22/02. (cv75)

4/15/02 Copy of receipt re: payment of docketing fee filed on behalf of Appellant Jonathan E.S. Bekhor, Appellant Int'l Investment, Appellant Bishop Saxony Corp. receipt #: E436473. [02-7401] (cv75)

4/22/02	Copy of district court order dated 10/11/00 endorsed by Hon. Lawrence N. McKenna, USDJ RECEIVED. [02-7401] (cv72)
4/22/02	Copy of district court motion orders dated 4/9/96 and 3/16/02 RECEIVED. [02-7401] (cv72)
4/22/02	Appellant Jonathan E.S. Bekhor Form C filed, with proof of service. [02-7401] Form C deadline satisfied. (cv72)
4/22/02	Appellant Jonathan E.S. Bekhor Form D filed, with proof of service. [02-7401] Form D deadline satisfied. (cv72)
5/3/02	Notice of appeal acknowledgment letter from Jeffrey Nolan Diamant for Appellant Bishop Saxony Corp., Investment, Jonathan E.S. Bekhor received. (cv72)
5/7/02	Notice of appeal acknowledgment letter from Lisa A. Cahill for Appellees Bear Sterns Sec., et al, received. (cv72)
5/7/02	Copy of District Court Docket entries and AMENDED NOTICE OF APPEAL on behalf of Appellant Jonathan E.S. Bekhor, Int'l Investment, Bishop Saxony Corp. filed. (cv72)
7/2/02	Scheduling order #1 filed. Record on appeal due on 8/1/02. Appellant's brief and appendix due on 8/8/02. Appellee's brief due on 9/9/02. Argument as early as week of 10/21/02. (Pre-Argument Conference scheduled for 7/18/02 @10:00a.m.-LG). (cv70)
7/2/02	Pre-Argument Conference Notice and Order from Lisa Greenberg filed. (cv70)
7/11/02	Appellee Josephthal Group motion to dismiss the appeal FILED (w/pfs). [2118585-1] (cv72)

7/11/02	Appellee Josephthal Group affidavit in support of motion # to dismiss [2118585-1] by Appellee Josephthal Group filed. (cv72)
7/15/02	Record on appeal index in lieu of record filed. (cv70)
7/18/02	First pre-argument conference held by Staff Counsel LG. (1167)
7/18/02	New scheduling order number 2 filed. New appellant's brief due date is 9/9/02. New appellee's brief due date is 10/9/02. New argument week as early as 11/18/02. LG (cv72)
7/23/02	Appellant Jonathan E.S. Bekhor response in opposition to motion to dismiss the appeal [2118585-1] filed (w/pfs). (cv72)
7/23/02	Appellant Jonathan E.S. Bekhor affidavit in support of the response to the motion to dismiss the appeal [2118585-1] filed (w/pfs). (cv72)
7/24/02	Notice to counsel re: scheduling order #2 (cv72)
7/29/02	Appellee Josephthal Group reply papers n [sic] further support of motion to dismiss # [2118585-1] by Appellee Josephthal Group filed. (cv72)
8/12/02	Record on appeal filed. (Original papers of district court.) Number of volumes: 8 (rev)
8/28/02	Order FILED DENYING motion to dismiss the appeal [2118585-1] by Appellee Josephthal Group, endorsed on motion dated 7/11/02. Plaintiffs appeal, pursuant to a Fed. R. Civ. P. 54(b) certification order, the district court order granting the defendants' motion for summary judgment. Defendants move to dismiss the appeal as untimely. This Court has determined that it lacks jurisdiction over this appeal

because it cannot be "infaired inferred" from the plaintiff-appellants' original notice of appeal that the judgment sought to be appealed was the district court judgment relating to the plaintiff-appellants' claims against the defendants. Daily Mirror, Inc. v. New York News, Inc., 533 F.2d 53, 56 (2d Cir.), cert. denied, 429 U.S. 862 (1976). Moreover, the plaintiff-appellant' amended notice of appeal is untimely pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure. Therefore, it is ORDERED that the appeal is dismissed. For The Court Lucille Carr. (cv72)

8/28/02 Certified copy of order dated 8/28/02 disposing of the appeal issued to district court. (cv72)

8/28/02 Notice to counsel re: order filed 8/28/02 (cv72)

8/30/02 Acco received in records room from team. (rer)